No. 87-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTH AFRICAN AIRWAYS,

Petitioner,

v.

ELIZABETH H. DOLE, SECRETARY
U.S. DEPARTMENT OF TRANSPORTATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Where an immediate revocation of the operating rights of South African Airways would violate a provision of the Air Transport Services Agreement in force between the United States and the Republic of South Africa, did the Court of Appeals err in upholding the construction of the Secretary of Transportation that §306(a)(2) of the Anti-Apartheid Act requires immediate revocation of the airline's operating rights, even though the plain language of §306(a)(2) does not require immediate revocation.

2. In upholding the construction of §306(a)(2) of the Anti-Apartheid Act by the Secretary of Transportation, did the Court of Appeals err in failing to apply the principle of construction that, for a statute to supersede or nullify an international agreement in force, there must be "positive repugnancy" between the provisions of the statute and the pre-existing international agreement and no possibility of harmony between them.

LIST OF THE PARTIES TO THE PROCEEDING IN THE COURT BELOW

The following persons and entities were parties before the United States Court of Appeals for the District of Columbia Circuit:

South African Airways was the Petitioner in the court below and is the Petitioner before the Court. South African Airways is not a corporation and has no parent, subsidiary or affiliate whose listing is required. SUP. CT. R. 28.1. South African Airways is an unincorporated operating entity of the Republic of South Africa.

Elizabeth H. Dole, Secretary of the United States Department of Transportation was the Respondent in the court below and is the Respondent before the Court.

Senators Edward M. Kennedy, Carl M. Levin, Lowell P. Weicker, and Representatives Richard A. Gephardt, William Gray, Mickey Leland, Howard Wolpe, and Transafrica, Inc. filed a Brief as Amici Curiae supporting the position of the Secretary of Transportation.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit denying the Petition of South African Airways to set aside the Final Order of the Department of Transportation (DOT), Order No. 86-11-29, revoking the foreign air carrier permit of South African Airways, is reported at 817 F.2d 119 (D.C. Cir. 1987). The opinion of the Court of Appeals is reprinted at pages 1a-16a of the Appendix to this Petition (hereinafter referred to as "App. ___ ").

The Final Order of the DOT, No. 86-11-29, is reprinted at pages 17a-25a of the Appendix to this Petition.

JURISDICTION

On April 24, 1987, the United States Court of Appeals for the District of Columbia Circuit denied the petition of South African Airways to set aside DOT Final Order 86-11-29. App. 26a-27a. No petition for reconsideration was filed in the Court of Appeals. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 306 of the Comprehensive Anti-Apartheid Act of 1986, Pub. L. 99-440 (hereinafter Anti-Apartheid Act) is reprinted in the Appendix at App. 28a-29a.

The Agreement between the United States of America and the Republic of South Africa Relating to Air Services Between their Respective Territories, and related Exchange of Notes[1] is reprinted in the Appendix at App. 33a-62a (hereinafter Agreement).

Section 1102(a) of the Federal Aviation Act provides:

> In exercising and performing their powers and duties under this Chapter, the Board and

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[1] Agreement between The United States of America and The Republic of South Africa Relating to Air Services Between Their Respective Territories, and the related Exchange of Notes, 61 Stat. 3057, T.I.A.S. 1639, 11 Bevans 501, 66 U.N.T.S 233; amended 4 U.S.T. 2205, T.I.A.S. 2875, 206 U.N.T.S. 334; amended 19 U.S.T. 5193, T.I.A.S. 6512, 706 U.N.T.S. 287.

> the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention or agreement that may be in force between the United States and any foreign country or foreign countries ....

49 U.S.C.A. §1502(a)(West Supp. 1987).

STATEMENT OF THE CASE

This case involves the termination of air services by South African Airways (SAA) to the United States and the revocation of SAA's operating permit by the Secretary of Transportation.

On May 23, 1947, the Government of the United States of America and the Government of the Union of South Africa (now the Republic of South Africa) entered into an Agreement governing air services between their respective territories. Although amended, this Agreement was in force between the two countries during all relevant periods. This international agreement granted to each Government the right to establish international air services between the two countries and to designate an airline to perform services on the routes set forth in the Annex to the Agreement. Agreement, App. 33a-62a.

The provisions of the Air Transport Services Agreement which relate to the revocation of permits and the termination of the Agreement are as follows:

ARTICLE VI

> Each contracting party reserves the right to withhold or revoke a certificate or permit to an air carrier designated by the other con-

tracting party in the event that it is not satisfied that substantial ownership and effective control of such carrier are vested in nationals of the other contracting party, or in case of failure by that carrier to comply with the laws and regulations referred to in Article V hereof, or otherwise to fulfill the conditions under which the rights are granted in accordance with this agreement and its annex.

* * * *

ARTICLE XI

(A) . . . .

(B) Either contracting party may at any time request consultation with the other with a view to initiating any amendments of this agreement or its annex which may be desirable in the light of experience. . . .

(C) . . . .

(D) When the procedure for a consultation provided for in paragraph (B) of the present article has been initiated, either contracting party may at any time give notice to the other of its desire to terminate this agreement. . . .

This agreement shall terminate one year after the date of receipt of the notice to terminate by the other contracting party unless the notice is withdrawn by agreement before the expiration of this period. . . ."

Agreement, App. 36a-37a, 39a.

On October 2, 1986, Congress enacted the Anti-Apartheid Act. This Act set forth a number of economic sanctions against the Republic of South Africa. Section 306 of the Anti-Apartheid Act dealt with sanctions relating to air transportation. App. 28a-29a.

The bill which eventually became the Anti-Apartheid Act was H.R. 4868. H.R. 4868, 99th Cong., 2d Sess. (1986). H.R. 4868 was ultimately amended to contain the language of Senate Bill 2701. S.2701, 99th Cong., 2d Sess. (1986). *See* 1986 U.S. CODE CONG. & AD. NEWS 2334.

Section 306(a)(2) of S.2701 originally provided:

> Upon termination of such agreement [Air Transport Services Agreement], the Secretary of Transportation shall prohibit any aircraft of a foreign air carrier owned, directly or indirectly, by the Government of South Africa or by South African nationals from engaging in air transportation with respect to the United States.

§306(a)(2), S.2701, 99th Cong., 2d Sess. (1986), 132 CONG. REC. S11548 (daily ed. Aug. 13, 1986).

In adopting this language, the Senate sought to avoid breach of the Air Transport Services Agreement by banning air transportation between South Africa and the United States only after the Agreement is terminated according to its terms, one year after notice of termination is given. *See* S. REP. NO. 370, 99th Cong., 2d Sess. 13-14 (1986).

In the final stages of the Senate debate on S.2701, the Senate passed a floor amendment introduced by Senator Sarbanes to amend the proposed §306 by

adding a new §306(a) and redesignating the above §306(a)(2) as §306(b)(2) of S.2701. 132 CONG. REC. S11712 (daily ed. Aug. 14, 1986).[2]

The new proposed §306(a) provided as follows:

> Sec. 306(a)(1) The President shall immediately notify the Government of South Africa of his intention to suspend the rights of any air carrier designated by the Government of South Africa under the Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between their Respective Territories, signed May 23, 1947, to service the routes provided in the Agreement.
>
> (2) Ten days after the date of enactment of this Act, the President shall direct the Secretary of Transportation to revoke the right of any air carrier designated by the Government of South Africa under the Agreement to provide service pursuant to the Agreement.
>
> (3) Ten days after the date of enactment of this Act, the President shall direct the Sec-

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[2] Section 306 of S.2701 is set forth at 132 CONG. REC. S11548 (daily ed. Aug. 13, 1986). Senator Weicker introduced a floor amendment to add a subsection (3) to §306(a) of S.2701. 132 CONG. REC. S11628-32 (daily ed. Aug. 14,1986). Thereafter, Senator Sarbanes introduced another floor amendment which passed, with the effect that §306(a) (1), (2), (3), (b) and (c) became §306 (b) (1), (2), (3), (c) and (d), respectively, of the Anti-Apartheid Act passed by the Congress. Senator Sarbanes' amendment added what ultimately became §306(a) (1), (2), and (3) of the Act.

> retary of Transportation not to permit or otherwise designate any United States air carrier to provide service between the United States and South Africa pursuant to the Agreement.

§306(a) of the Anti-Apartheid Act, App. 28a. *See* 132 CONG. REC. S11712 (daily ed. Aug. 14, 1986).

Senator Lugar opposed the amendment of Senator Sarbanes and argued in debate that immediate suspension of the permit of South African Airways would be a violation of the Agreement. 132 CONG. REC. S11713 (daily ed. Aug. 14, 1986).

Senator Dodd apparently was unaware of the possible breach by the United States presented by the Sarbanes amendment. On that point, Senator Lugar stated:

> I would just say to the distinguished Senator [Dodd] he probably will not argue that we ought to unilaterally go about violating international agreements, nor do I, nor does the Senator from Maryland [Sarbanes].

Id. Senator Dodd responded:

> I must say to my good friend he reads my mind. Of course, he would not argue that at all.

Id.

At no time, in the succeeding debate, did any senator voice an intent to violate the terms of the Air Transport Services Agreement. Senator Sarbanes himself stated that "it is my contention that we are not unilaterally abrogating the Agreement." *Id.* at

S11713-14. He argued that the Republic of South Africa had breached an "objective" of the Agreement stated in Section IV of the Annex to the Agreement on the basis of which the United States could suspend services under Article VI. 132 CONG. REC. S11712-14 (daily ed. Aug. 14, 1986).

While the senators indicated a desire for "immediate suspension" of South African Airways, they also expressly did not intend to breach the Air Transport Services Agreement.

The Anti-Apartheid Act passed with the Sarbanes Amendment. The President vetoed the Act, but the Congress overrode the President's veto, and the Anti-Apartheid Act was enacted into law on October 2, 1986.

On October 10, 1986, the Department of State of the United States delivered a note to the South African Embassy requesting consultation pursuant to paragraph (B) of Article XI of the Agreement and giving notice of termination of the Agreement in one year pursuant to paragraph (D) of Article XI of the Agreement. App. 39a. This was done in compliance with §306(b)(1) of the Anti-Apartheid Act.

The President never "immediately" notified "the Government of South Africa of his intention to suspend the rights" of South African Airways under §306(a)(1) of the Anti-Apartheid Act.

However, on October 27, 1986, President Reagan issued Executive Order No. 12,576 which stated that "[t]he Secretary of Transportation shall take the steps specified in Section 306(a)(2) and (3) of the Act." Exec. Order No. 12,576, 51 Fed. Reg. 39505 (1986), App. 31a.

On October 28, 1986, the Department of Transportation (DOT) issued an Order To Show Cause, Order 86-10-60, requesting comments by October 30, 1986, as to why the permit of South African Airways should not be revoked. On October 30, 1986, SAA filed a response opposing the revocation.

On November 5, 1986, DOT released the text of an order dated October 31 which it had submitted to the President pursuant to §801 of the Federal Aviation Act, 49 U.S.C.A. §1461 (West Supp. 1987). On November 13, 1986, stating that it had "received notification that the President did not intend to disapprove the Department's order," DOT issued DOT Final Order 86-11-29 revoking the permit of SAA effective November 16, 1986. Final Order, App. 17a. The DOT also denied SAA's request for a stay of the revocation order pending judicial review.

On November 14, 1986, SAA filed a Petition For Review of the DOT Final Order in the United States Court of Appeals for the District of Columbia Circuit pursuant to §1006(a) of the Federal Aviation Act, 49 U.S.C.A. §1486(a) and an emergency motion for a stay of the final DOT Order. Also on November 14, 1986, following the denial by the Court of Appeals of SAA's motion for a stay, SAA moved Chief Justice William Rehnquist, Circuit Justice for the District of Columbia Circuit, for a stay pending review on the merits by the Court of Appeals. On November 15, 1986, Chief Justice Rehnquist denied the motion.

The review proceeded on the merits and on April 24, 1987, the Court of Appeals issued its opinion denying SAA's Petition to set aside the DOT Final Order revoking the SAA foreign air carrier permit.

The Court of Appeals stated:

> Petitioner argues that although section 306(a)(2) required the President ten days after the Act's enactment to direct the Secretary to revoke SAA's permit, the section is silent as to when such revocation is to take place. Therefore, the Secretary could have timed the actual suspension of the permit to coincide with the termination of the Agreement. While this is true in the literal sense, it is impossible to reconcile such a construction with other provisions of Section 306 that compel the conclusion that Congress intended to terminate air service to the United States by South African carriers without regard to the one-year notice required for the termination of the Agreement.

Opinion, 817 F.2d at 124, App. 9a.

The reason the Court stated that "it was impossible to reconcile" SAA's construction of §306(a)(2) in harmony with the Agreement was the following:

> Subsection 306(a)(1) required the President to "*immediately* notify" (emphasis added) the South African Government of his intention to suspend such service, and subsection 306(a)(2) called for him to direct the Secretary ten days later to revoke the right of any carrier designated by the government of South Africa to provide air service pursuant to the Agreement. Given the evident urgency of those instructions, it is hard to believe that Congress intended the Secretary to wait an-

> other 365 days before actually suspending petitioner's permit.

Id.

Apart from the statutory language of §306(a), the Court of Appeals also found that "both the circumstances of the enactment of section 306(a) and the accompanying debate make it impossible to reach any conclusion other than that Congress intended the expeditious suspension of SAA's permit." *Id.*

The court concluded "that the clear meaning of the amendment coupled with the absence of any contrary view in the legislative record requires the conclusion that Congress intended the Secretary to give immediate effect to its mandate." *Id.* at 124, App. 10a.

In its ruling, however, the court below declined to decide whether §306(a), as construed by the court below, in fact violated any provision of the Air Transport Services Agreement. The Court of Appeals said:

> Whatever the merits of this exchange between Senators Lugar and Sarbanes, there is no indication in the legislative history to suggest that in adopting the Anti-Apartheid Act as amended, Congress intended to abrogate any provision of the Agreement. Nor must we decide whether section 306(a) in fact violates any such provision.

Opinion, 817 F.2d at 125, App. 11a.

Accordingly, the Court of Appeals denied the petition of SAA to set aside the DOT Final Order revoking the SAA foreign air carrier permit.

SAA herein petitions the Court to review that decision.

JURISDICTION OF AGENCY AND COURT BELOW

The DOT had jurisdiction to issue orders in respect to the revocation of foreign air carrier permits subject to disapproval by the President. 49 U.S.C.A. §1461(a) (West Supp. 1987). When the President did not disapprove the action of the Secretary, the revocation order took "effect as an action of [DOT], not of the President," and as such was subject to judicial review by the Court of Appeals as provided in 49 U.S.C. §1486. 49 U.S.C.A. §1461(a) (West Supp. 1987).

The court below so held. Opinion, 817 F.2d at 122-23, App. 5a-6a. Both the DOT and the Court of Appeals had jurisdiction respectively to rule upon and review the revocation of SAA's foreign air carrier permit. SUP. CT. R. 21(i).

REASONS FOR GRANTING THE WRIT

Since the decision in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), it has been a rule of statutory construction established by the Court that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." 6 U.S. (2 Cranch) at 118.

"[T]he purpose by statute to abrogate a treaty or any designated part of a treaty .... must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute...." *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902). "[T]here must be positive repugnancy between the provisions of the new laws and those of the old; .... and that 'if harmony is impossible, and only in that event, the former law is repealed, in part or wholly, as the case may be.'" *Id.* at 221-22 (citations omitted).

These rules of construction applicable to the construction of a statute which might affect an international agreement in force should have been applied by the court below in construing §306(a)(2) of the Anti-Apartheid Act.

In failing to follow principles of construction established by the Court in the above-cited cases, the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of the Court. SUP. CT. R. 17.1(c).

ARGUMENT

The court below construed §306(a)(2) of the Anti-Apartheid Act as requiring immediate revocation of SAA's permit without consideration of whether, under the rules of construction established by the Court, §306(a)(2) and the Air Transport Services Agreement can be construed in harmony, without superseding or nullifying this international agreement of the United States. In so doing, the court below decided a federal question in a manner which conflicts with the decisions of the Court.

Without exception, the Court has sought to uphold the international commitments of the United States. "Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the Court cannot be unmindful of the fact, that the honor of the Government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected." *Chew Heong v. United States*, 112 U.S. 536, 540 (1884).

These international commitments, whether by treaty or executive agreement, cannot be abrogated or

superseded except by congressional act in which "positive repugnancy" exists between provisions of the later-enacted statute and the provisions of the treaty or international agreement in force. *United States v. Lee Yen Tai*, 185 U.S. 213 (1902).

> [T]he purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty.
>
> In the case of statutes alleged to be inconsistent with each other in whole or in part, the rule is well established that effect must be given to both, if by any reasonable interpretation that can be done; that "there must be positive repugnancy between the provisions of the new laws and those of the old; . . . and that "if harmony is impossible, and only in that event, the former law is repealed, in part or wholly, as the case may be." . . . .
>
> The same rules have been applied where the claim was that an act of Congress had abrogated some of the provisions of a prior treaty between the United States and China. *Chew Heong v. United States*, 112 U.S. 536, 550.

Id. at 221-22 (citations omitted).

"[A]ffirmative congressional expression" is necessary to abrogate provisions in an international agreement. *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982).

See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §134 (Tent. Draft No. 6, 1985).

Therefore, under these cases, the language of the statute alone is controlling on the issue whether a stipulation or provision in an international agreement of the United States is nullified or superseded by an act of Congress.

Where the court below erred was to construe the statute as if an international agreement was not affected. The court below construed the various provisions of §306 of the Anti-Apartheid Act to determine Congress' intention and purpose, for which it found support in the legislative history. Then, satisfied that it had ferreted out the construction Congress intended, the court held that it did not need to reach the question whether §306(a)(2) in fact violated any provision of the Agreement.

Where, as in this case, South African Airways placed the Air Transport Services Agreement in issue and claimed that the Secretary's construction was inconsistent with the Agreement, the court below, under the holdings of the Court, was required to construe the statute in light of the international agreement, look at its language and determine whether, by any reasonable construction, the statute and international agreement can stand together. For the statute to supersede an international agreement, under the rulings of the Court, "it must appear that the later provision is certainly and clearly in hostility to the former." *Chew Heong v. United States*, 112 U.S. at 549-550 (citations omitted).

Looking at the language of §306 alone, the court below conceded that §306(a), in a literal sense, was

silent as to when such revocation (of SAA's permit) was to take place, and that the Secretary could have timed the actual suspension of the permit to coincide with the termination of the Agreement. Opinion, 817 F.2d at 124, App. 9a.

Nevertheless, the court below found an "urgency" in §306(a)(1) which required that the President "immediately" notify the South African Government of his intention to suspend and in §306(a)(2) which required him to direct the Secretary within ten days to revoke the operating rights of SAA. Based upon this "urgency," the court below concluded that "it is hard to believe that Congress intended the Secretary to wait another 365 days before actually suspending petitioner's permit." Opinion, 817 F.2d at 124, App. 9a.

However reasonable the court below may be in drawing this conclusion from the language of the statute, the statute in its plain language did not, as the court below acknowledged, direct the Secretary to revoke "immediately."

In construing a statute such as §306(a)(2), which is silent or unclear on the timing of the revocation, it is not unreasonable to speculate, as the court below did, that "it is hard to believe that Congress intended the Secretary to wait another 365 days before actually suspending petitioner's permit." Opinion, 817 F.2d at 125, App. 9a. In such case, it is also appropriate in construing a statute to look to the legislative history to determine what Congress intended.

These aids to statutory construction, under the decisions of the Court, simply do not apply where such a construction would result in a breach by the United

States of an international agreement. The rules of construction which do apply are that if the statute, specifically § 306(a)(2), can be read in harmony with the stipulation of an international agreement, the court must do so.

Section 306(a)(2) is silent as to when the Secretary is to revoke the operating rights of SAA. In light of the terms of the Air Transport Services Agreement, §306(a)(2) can be construed in harmony with §306(b)(2) and the other provisions of §306, namely, that the operating rights of SAA are to be revoked upon termination of the Agreement, or, if SAA violated Article VI of the Agreement or its permit conditions before termination.

Termination of the Agreement in § 306(b)(2) of the Anti-Apartheid Act and revocation of operating rights in §306(a)(2) are distinct acts. After termination of the Agreement, revocation usually follows. However, a carrier's violation of its permit (*see* SAA's Permit, App.63a) or a carrier's violation of Article VI of the Agreement could, consistent with the Agreement, be the basis for permit revocation, without the termination of the Agreement.

Neither the Secretary of Transportation nor the court below found that South African Airways violated Article VI of the Agreement or any condition of its permit. SAA's permit was revoked only because of an erroneous construction of §306(a)(2) by the Secretary, upheld by the court below. The erroneous construction was created by the Secretary's failure to follow the rules of construction established by the Court where violation of a treaty or international agreement would result from such a construction.

The court below was aware of the Court's rulings in *United States v. Lee Yen Tai*, 185 U.S. 213 (1902), and *Weinberger v. Rossi*, 456 U.S. 25 (1982). The court below attempted to distinguish these cases, stating "in neither case did the Court face an unambiguous congressional mandate to do something which in turn *might* abrogate U.S. international obligations." Opinion, 817 F.2d at 125 n.2., App. 12a. However, no such "unambiguous congressional mandate" appears in §306. While the court below stated that a construction consistent with the Agreement was "impossible to reconcile. . . with other provisions of §306," Opinion, 817 F.2d at 124, App. 9a, the court below actually found only "it is hard to believe that Congress intended" the Secretary to act consistently with the Agreement. *Id.*

When the court draws such a conclusion of presumed congressional intent, it fails to find in the language of the statute itself an affirmative congressional expression to abrogate an international agreement. Thus when the Court of Appeals later refers to an "unambiguous congressional mandate" or "unambiguous statutory mandate," Opinion, 817 F.2d at 125 n.2., App. 12a n.2., it refers not to the statutory language itself, but to the court's conclusion based upon its application of general rules of statutory construction.

The court below erred in failing even to consider whether its construction would breach the Air Transport Services Agreement, and whether language of the statute lent itself to a construction in harmony with the Agreement.

The court below stated that

> there is no indication in the legislative history to suggest that in adopting the Anti-Apartheid Act as amended, Congress intended to abrogate any provision of the Agreement. . . . If petitioner's construction of Section 306(a)(2) were permissible, the lack of an express congressional intent to abrogate the permit revocation provision of the Agreement would lend support to SAA's position.

Opinion, 817 F.2d at 125, App. 11a-12a.

In so holding, the court below misreads *Chew Heong v. United States*, 112 U.S. 536 (1884), and its progeny. Those decisions do not rely on the presence or absence of legislative intent to abrogate or not to abrogate an international agreement in force. Those holdings establish rules of construction when an outstanding international agreement is to be deemed abrogated by an act of Congress. In effect, the Court has held where several constructions of a statute are possible, the construction which should be placed upon a statute is one in harmony with the international agreement. In this case, the construction chosen by the Secretary and the court below was adduced without consideration of whether a construction of §306 was possible which would be in harmony with the Agreement. *See* §1102(a) of the Federal Aviation Act, 49 U.S.C. §1502(a) (West Supp. 1987).

The issue in this case concerns a solemn commitment made by the United States with another nation and when, as a matter of the domestic law, an international agreement entered into by the President is to be abrogated by an act of Congress. This issue

affects not only the Air Transport Services Agreement in this case. The issue affects all treaties and executive agreements of the United States. The issue affects Congress' involvement in the conduct of foreign affairs and the powers of the President to make agreements with foreign sovereigns binding upon the United States.

The Court's holdings in the past have honored the international commitments of the United States, wherever possible, when such commitments were brought into conflict by a construction of a later act of Congress. While upholding Congress' constitutional power to bring about a breach of such commitments, the Court has required the Congress to do so explicitly in language in the statute itself which is plainly contrary to the stipulation of the treaty or international agreement. Nothing less will do.

The plain language of §306(a)(2) fell short of that standard. Read in light of the stipulations in the Air Transport Services Agreement, the language of §306(a)(2) did not require "immediate" revocation of SAA's permit. Consistent with the Agreement, §306(a)(2) should have been construed as providing that the Secretary was to revoke the permit of SAA upon termination of the Agreement, or otherwise consistently with the Agreement.

CONCLUSION

For the reasons set forth above, petitioner South African Airways urges that this petition for a writ of certiorari be granted.

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APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1620

SOUTH AFRICAN AIRWAYS, PETITIONER

v.

ELIZABETH H. DOLE, Secretary,
U.S. Department of Transportation, RESPONDENT

Petition for Review of an Order of the
U.S. Department of Transportation

Argued January 12, 1987

Decided April 24, 1987

Thomas J. Whalen, with whom *Moffett B. Roller*, *Robert P. Silberberg*, and *Quentin Crommelin, Jr.* were on the brief, for petitioner.

Kenneth N. Weinstein, Deputy Assistant General Counsel for Litigation, U.S. Department of Transportation, with whom *Thomas L. Ray*, Senior Trial Attorney, U.S. Department of Transportation, and *Robert B. Nicholson* and *David Seidman*, Attorneys, U.S. Department of Justice, were on the brief, for respondent.

William L. Robinson and *Goler T. Butcher* were on the brief for *amici curiae* Senator Edward Kennedy, *et al.*, *urging affirmance.*

Before EDWARDS, SILBERMAN, and BUCKLEY, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: Petitioner South African Airways ("SAA") asks this court to set aside an order issued on October 31, 1986 by the Secretary of Transportation revoking its permit to provide air service between the United States and South Africa. The order was issued pursuant to section 306(a) of the Comprehensive Anti-Apartheid Act of 1986, which directed the revocation of the right of any designee of the South African government to provide air service pursuant to the terms of an executive agreement between the United States and South Africa dated May 23, 1947 ("Agreement").[1]

Petitioner challenges the Secretary of Transportation's order on the principal grounds that as the immediate revocation of its permit was neither allowed by the Agreement (which remains in effect at least until October 1987) nor required by the Anti-Apartheid Act, the order violates both a provision of the Federal Aviation Act directing the Secretary of Transportation to observe international agreements and Supreme Court precedent requiring that statutes and executive agreements be interpreted, where possible, so as to give effect to both.

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[1] Agreement between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories, May 23, 1947, 61 Stat. 3057, T.I.A.S. No. 1639, *as amended by* Agreement between the United States of America and the Union of South Africa, Nov. 2, 1953, 4 U.S.T. 2205, T.I.A.S. No. 2870, and Air Transport Services Agreement, June 28, 1968, United States-South Africa, 19 U.S.T. 5193, T.I.A.S. No. 6512 (substituting "Republic" for "Union" throughout Agreement, as amended).

We reject these arguments because we conclude that Congress intended the immediate suspension of the rights enjoyed by SAA pursuant to the Agreement. As Congress has authority to "regulate Commerce with foreign Nations" and to "make all Laws which shall be necessary" for the exercise of that authority, section 306(a) of the Act overrides any provision of the Agreement or of the Federal Aviation Act with which it may be inconsistent.

I. Factual Background

In October 1986, Congress enacted the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 ("Anti-Apartheid Act" or "Act"). Section 306(b)(1) of the Act directs the Secretary of State to "terminate the Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories, signed May 23, 1947, in accordance with the provisions of that agreement." Article XI of the Agreement provides for its termination upon one year's notice given by either party. Agreement, 61 Stat. at 3061. The Agreement also specifies limited conditions under which permits issued pursuant to the Agreement may be revoked. Agreement, art. VI, 61 Stat. at 3059-60. Section 306(a)(2) of the Act, which was offered in the Senate as a floor amendment, provides:

> Ten days after the enactment of this Act, the President shall direct the Secretary of Transportation to revoke the right of any air carrier designated by the Government of South Africa under the Agreement to provide service pursuant to the Agreement.

On October 10, 1986, the Secretary of State delivered the one-year termination notice to the South African Ambassador, and seventeen days later the President issued Executive Order 12,571 directing the Secretary of Transportation ("Secretary") to take the steps specified in

section 306(a)(2) of the Act. Exec. Order No. 12,571, 51 Fed. Reg. 39,505 (1986). The Secretary thereupon issued Department of Transportation ("DOT") Final Order 86-11-29 ("Final Order") in which she initiated the steps required to effect an immediate revocation of South African Airways' permit. As required by section 801(a) of the Federal Aviation Act of 1958 ("Aviation Act"), 49 U.S.C. app. § 1461(a) (1982), the Final Order was transmitted to the President for review, at which point he could have exercised his prerogative under that section to disapprove the Final Order on foreign policy or national security grounds. He declined to do so, and SAA's permit was accordingly revoked effective November 16, 1986.

SAA challenges the Secretary's action as not required by the Act, as in violation of the Agreement, and consequently, both in conflict with Supreme Court precedent and illegal under section 1102(a) of the Aviation Act, which provides:

> In exercising and performing their powers and duties under this chapter, the [Civil Aeronautics] Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country . . . .

49 U.S.C. app. § 1502(a) (1982).

In response, the Secretary challenges the statutory jurisdiction of this court to review the Final Order, questions the propriety of such a review under the "political question" doctrine, and asserts the correctness of her determination that section 306(a)(2) required her to terminate SAA's permit authority promptly without awaiting the expiration of the Agreement.

II. ANALYSIS

A. *Jurisdiction*

1. Statutory

This court has jurisdiction to review the Final Order under section 1006 of the Aviation Act, 49 U.S.C. app. § 1486 (1982). Section 1006, as codified, provides:

> Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this Appendix, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia . . . .

49 U.S.C. app. § 1486(a) (1982).

The applicable language of section 1461, as amended by section 34 of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1740 ("Deregulation Act"), in turn provides:

> [R]evocation of . . . any permit issuable to any foreign air carrier . . . shall be presented to the President for review. The President shall have the right to disapprove any such [DOT] action concerning such . . . permits solely upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction, but not upon the basis of economic or carrier selection considerations. . . . Any such [DOT] action not disapproved . . . shall take effect as action of the [DOT], not the President, and as such shall be subject to judicial review as provided in section 1486 of this Appendix.

49 U.S.C. app. § 1461(a) (1982).

In the Deregulation Act, Congress amended section 1461(a) in such a way as to make clear its intention that decisions of the Civil Aeronautics Board (and now the

Secretary of Transportation) are not to be subject to the affirmative approval of the President as they previously had been under section 1461 prior to its amendment. *See* H.R. Rep. No. 1211, 95th Cong., 2d Sess. 61 (1978) (showing both the original and amended versions of section 1461). Whereas the original text provided that "any permit issuable to any foreign air carrier . . . shall be subject to the approval of the President," with no restriction on the President's discretion, the new scheme allocates a much narrower role to the President. *See id.* at 19. The President may still disapprove such decisions, but only "upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction." 49 U.S.C. app. § 1461(a) (1982) (as amended by the Deregulation Act).

Thus when the Secretary forwarded the Final Order to the White House, she was submitting it not for "the approval of the President as provided in section 1461," 49 U.S.C. app. § 1486(a) (1982), but for his *review* and possible disapproval for foreign policy and/or national defense considerations. Consequently, as the Final Order was not "subject to the approval of the President as provided in section 1461," it is subject to review by this court. Furthermore, even if we were to equate "subject to approval" with "subject to disapproval," the order would still be reviewable by this court because section 1461(a) stipulates that if a DOT action is not disapproved, it "shall take effect as action of [DOT], not of the President, and as such shall be subject to judicial review as provided in section 1486 of this Appendix." 49 U.S.C. app. § 1461(a) (1982).

2. Political Question

The Secretary reminds us that "matters 'vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of govern-

ment as to be largely immune from judicial inquiry or interference.'" *Holmes v. Laird*, 459 F.2d 1211, 1215 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)). Nevertheless, the Supreme Court has also noted that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). "[T]he courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 106 S. Ct. 2860, 2866 (1986) (construing *Baker v. Carr*).

It is clear that we have the competence to interpret the meaning of section 306(a)(2) of the Anti-Apartheid Act and to assess its intended impact on the permit granted SAA pursuant to the Agreement. The question we must consider, therefore, is whether in doing so we would trespass on territory reserved to the political branches for constitutional or prudential reasons. For guidance in this matter, we look to *Baker v. Carr*:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

396 U.S. at 217. On applying these factors to the case before us, we see no reason to conclude it is nonjustici-

able. The text of the Constitution does not commit the subject matter to a political department, nor is there a lack of judicially discoverable and manageable standards for resolving the narrow issues before us. Our decision does not require an initial policy determination of a kind clearly reserved for nonjudicial discretion; it need not express a lack of the respect due coordinate branches of government; and in reaching the issues before us, we are not bound by a political decision already made. Finally, we see no risk that we will cause embarrassment through a proliferation of pronouncements on a sensitive matter of foreign policy.

As Justice White stated in *Japan Whaling Ass'n*, "under the Constitution, one of the judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." 106 S. Ct. at 2866. As we find no constitutional or prudential bar to our construction of section 306(a), we conclude that this case presents a justiciable controversy.

B. *Interpretation and Application of Section 306(a)(2)*

We now address petitioner's principal argument; namely, that because section 306(a)(2) does not require the immediate revocation of SAA's permit, and because such a revocation violates provisions of the Agreement, the Secretary is required both by Supreme Court precedent, *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ."), and by section 1102(a) of the Aviation Act to adopt an interpretation of section 306(a) that does not conflict with the provisions of the Agreement. Petitioner's argument may be broken down into three distinct claims: (1) immediate revocation is not required by the Act; (2) as immediate revocation entails a violation of the Agree-

ment, such a revocation is impermissible under the applicable principle of statutory construction; and (3) the Secretary is bound by section 1102 of the Aviation Act to construe section 306(a)(2) consistently with the permit revocation provisions of the Agreement.

1. Timing of Revocation

Petitioner argues that although section 306(a)(2) required the President ten days after the Act's enactment to direct the Secretary to revoke SAA's permit, the section is silent as to when such revocation is to take place. Therefore, the Secretary could have timed the actual suspension of the permit to coincide with the termination of the Agreement. While this is true in the literal sense, it is impossible to reconcile such a construction with other provisions of section 306 that compel the conclusion that Congress intended to terminate air service to the United States by South African carriers without regard to the one-year notice required for termination of the Agreement. Subsection 306(a)(1) required the President to "*immediately* notify" (emphasis added) the South African government of his intention to suspend such service, and subsection 306(a)(2) called for him to direct the Secretary ten days later to revoke the right of any carrier designated by the government of South Africa to provide air service pursuant to the Agreement. Given the evident urgency of those instructions, it is hard to believe that Congress intended the Secretary to wait another 365 days before actually suspending petitioner's permit.

Furthermore, both the circumstances of the enactment of section 306(a) and the accompanying debate make it impossible to reach any conclusion other than that Congress intended the expeditious suspension of SAA's permit. In its original form, section 306 went no further than to direct termination of the Agreement on its own terms. Therefore, the actual suspension of SAA's landing rights would not have occurred for another year. It

was for the express purpose of accelerating that suspension that Senators Sarbanes and Kassebaum introduced section 306(a) as an amendment to the version of the Anti-Apartheid Act submitted by the Senate Foreign Relations Committee. In presenting the amendment, Senator Sarbanes stated:

> The amendment that the Senator from Kansas and I have offered would bring a suspension of air service 10 days after the enactment of the legislation. It would have the President notify South African authorities of his intention to suspend and 10 days later, the suspension would take effect.

132 Cong. Rec. S11,712 (daily ed. Aug. 14, 1986).

Although senators spoke both in favor of and against the amendment, none questioned that its effect would be immediate. Committee Chairman Lugar, for example, strongly opposed the amendment on the explicit ground that in his judgment the revocation would violate the Agreement. At the same time, he reiterated his approval of the Act's original provision, in what is now section 306(b), that would have limited the sanction to giving South Africa the one year's notice of termination required by the Agreement. 132 Cong. Rec. S11,714. Thus his subsequent vote to table the amendment could only have confirmed his understanding of the immediacy of its effect.

We conclude that the clear meaning of the amendment coupled with the absence of any contrary view in the legislative record requires the conclusion that Congress intended the Secretary to give immediate effect to its mandate.

2. Reconciliation of Section 306(a) and the Agreement

SAA argues that notwithstanding the evident meaning of section 306 and its legislative history, Supreme Court

precedent nevertheless requires that it be construed in a manner that will not require the United States to violate its obligations under an executive agreement. SAA points out that Article VI of the Agreement specifies the circumstances under which a permit may be revoked and contends that this court must construe section 306 in a manner consistent with the permit revocation provision of the Agreement.

In debate Senator Lugar asserted that the Sarbanes amendment would require this country to violate the Agreement, and based his opposition to its adoption on this interpretation. Senator Sarbanes, on the other hand, argued that his amendment would not breach the Agreement: "[I]t is my contention that we are not unilaterally abrogating the agreement. On the contrary we are working within the parameters of the agreement." 132 Cong. Rec. S11,713-14. Senator Sarbanes argued that South Africa had failed to implement an "objective" expressed in the Agreement, namely, "to 'foster and encourage the widest possible distribution of the benefits of air travel for the [sic] good of mankind . . . and to stimulate international [sic] travel as a means of promoting friendly understanding and good will among peoples [sic].'" 132 Cong. Rec. S11,712 (quoting Agreement Annex § IV(A), 61 Stat. at 3062).

Whatever the merits of this exchange between Senators Lugar and Sarbanes, there is no indication in the legislative history to suggest that in adopting the Anti-Apartheid Act as amended, Congress intended to abrogate any provision of the Agreement. Nor must we decide whether section 306(a) in fact violates any such provision. *Cf. Whitney v. Robertson*, 124 U.S. 190, 195 (1888) ("[W]hen a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. . . . The duty of the courts is to construe and give effect to the latest expression of the sover-

eign will."). Nevertheless, for the narrow purpose of addressing petitioner's reliance on a principle of statutory construction, we will assume, *arguendo*, that the mandate in section 306(a)(2) does in fact violate the Agreement.

If petitioner's construction of section 306(a)(2) were permissible, the lack of an express congressional intent to abrogate the permit revocation provision of the Agreement would lend support to SAA's position.[2] Since the days of Chief Justice Marshall, the Supreme Court has consistently held that congressional statutes must be construed wherever possible in a manner that will not require the United States "to violate the law of nations." *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118 (quoted in *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982)). The Court's extreme reluctance to find a conflict between an act of Congress and a pre-existing international agreement of the United States finds eloquent expression in *Chew Heong v. United States*, 112 U.S. 536 (1884):

> "There would no longer be any security," says Vattel, "no longer any commerce between mankind, if [nations] did not think themselves obliged to keep faith

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[2] Petitioner relies heavily on the Court's reasoning in *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902) ("the purpose by statute to abrogate a treaty or any designated part of a treaty . . . must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute"), and *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) ("affirmative congressional expression [is] necessary to evidence an intent to abrogate provisions in 13 international agreements"). Both of these cases can be distinguished; in neither case did the Court face an unambiguous congressional mandate to do something which in turn *might* abrogate U.S. international obligations. As we mentioned earlier, we do not decide whether the Anti-Apartheid Act does in fact abrogate terms of the Agreement. Furthermore, even if the Act did effect an abrogation, the Court's reasoning in *Lee Yen Tai* and *Weinberger v. Rossi* cannot defeat the unambiguous statutory mandate before us now.

> with each other, and to perform their promises." Vattel, Book 2, ch. 12. And as sovereign nations, acknowledging no superior, cannot be compelled to accept any interpretation, however just and reasonable, "the faith of treaties constitutes in this respect all the security of contracting powers." Ib. ch. 17. . . . Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected.

Id. at 539-40.

The Court in *Chew Heong* compared the abrogation of a treaty through an act of Congress to the repeal of one statute by another, noting that even in the case of statutes "whose repeal or modification involves no question of good faith with the government or people of other countries, the rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act." *Id.* at 549. The Court went on to suggest the circumstances that will permit such implied repeal:

> "[T]here must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy." . . . "[I]t must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, [sic] or wholly, as the case may be."

Id. at 549-50 (quoting *Wood v. United States*, 41 U.S. (16 Pet.) 342, 362-63 (1842), and *State v. Stoll*, 84 U.S. (17 Wall.) 425, 431 (1873)).

As we have noted, however, the purpose of Congress in adopting the Sarbanes amendment was unambiguous. Therefore, if there is in fact "a positive repugnancy" between section 306(a) of the Anti-Apartheid Act and Article VI of the Agreement, the latter must yield. "[S]o far as the provisions of [an] act [of Congress are] in conflict with any treaty, they must prevail in all courts of this country . . . ." *Whitney v. Robertson*, 124 U.S. at 195. Furthermore, "it is wholly immaterial to inquire whether by the act . . . [Congress] has departed from the [Agreement] or not, or *whether such departure was by accident or design* . . . ." *Id.* (emphasis added).

Congress has express constitutional powers to "regulate Commerce with foreign Nations" and to "make all Laws which shall be necessary and proper for carrying into Execution [such] Powers." U.S. Const. art. I, § 8. As this court has noted, "Under our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it." *Diggs v. Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

3. The Aviation Act's General Prohibition

As we conclude that section 306(a)(2) supersedes whatever provisions of the Agreement may be in conflict with that section, so must it supersede, to the degree required, the Secretary's general duty under section 1102 of the Aviation Act, 49 U.S.C. § 1502(a) (1982), to exercise her powers "consistently with any obligations assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country." Section 306(a)(2) of the Anti-Apartheid Act is a very specific congressional directive. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."

Morton v. Mancari, 417 U.S. 535, 550-51 (1974) (citations omitted). Petitioner's argument that the Secretary was bound by section 1102 of the Aviation Act to construe section 306(a)(2) consistently with the permit revocation provisions of the Agreement is therefore without merit.

4. Remaining Argument

We have also considered, but found without merit, petitioner's argument that, by its own terms, section 306 of the Anti-Apartheid Act does not apply to SAA. Section 306(a)(2) directs the revocation of "the right of any air carrier designated by the Government of South Africa under the Agreement to provide service pursuant to the Agreement." Section 306(d), as amended by the Act of November 7, 1986, Pub. L. No. 99-631, 100 Stat. 3516, provides that the term "air carrier" in section 306 is to be given the meaning of that term in section 101 of the Aviation Act, 49 U.S.C. § 1301 (1982). Section 101, in turn, defines "air carrier" as "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation . . . ." 49 U.S.C. app. § 1301(3) (1982). Accordingly, petitioner claims that SAA is not subject to the terms of section 306(a)(2) because it is not a "citizen of the United States"; and therefore, that it should not have been the object of the Final Order implementing that section. We reject this ingenious interpretation of the Act because in context it is clear that the words "air carrier" apply explicitly to a South African carrier.

As "air carrier" is immediately followed by "designated by the Government of South Africa under the Agreement," it is clear that we are not dealing with U.S. citizens. The Agreement requires that designated air carriers be owned or controlled by nationals of the designating country or else the permit issued by the other country may be revoked:

> Each contracting party reserves the right to withhold or revoke a certificate or permit to an air carrier designated by the other contracting party in the event that it is not satisfied that substantial ownership and effective control of such carrier are vested in nationals of the other contracting party . . . .

Agreement, art. VI, 61 Stat. at 3059. Accordingly, we read "air carrier designated by the Government of South Africa under the Agreement" as clearly distinguishable from "air carrier" standing alone.

III. Conclusion

The Secretary correctly interpreted section 306(a)(2) of the Anti-Apartheid Act. Section 306(a)(2) unambiguously calls for expedited revocation of any permit issued to a South African air carrier pursuant to the Agreement whether or not the revocation may later be found to constitute a breach of the Agreement. The petition to set aside DOT Final Order 86-11-29 is therefore

Denied.

Order 86-11-29

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 31st day of October, 1986

Docket 44454

IN RE:

TERMINATION OF AIR CARRIER OPERATIONS BETWEEN THE UNITED STATES AND SOUTH AFRICA

FINAL ORDER

By Order 86-10-60, issued and served October 28, 1986, the Department directed all interested persons to show cause why it should not 1) revoke the section 402 permit of South African Airways (SAA), 2) condition the operating authority of all U.S. air carriers to prohibit service between the United States and South Africa and 3) condition the operating authority of all U.S. air carriers to prohibit the take off and landing of their aircraft in South Africa. The Order noted that section 306 of the Comprehensive Anti-Apartheid Act of 1986 (Act) required the President to direct the Secretary of Transportation to take these first two steps and that, by Executive Order dated October 27, the President issued that directive. Order 86-10-60 proposed that the revocation of SAA's section 402 permit be effective on the third day following the effective date of the final order. It further required that comments be filed not later than 5:00 pm, October 30, 1986.

On October 30, SAA filed comments in opposition to Order 86-10-60, arguing that: immediate revocation of SAA's permit is not required by the Act or the Executive Order, but would violate the Air Transport Services Agreement (Agreement) and constitute an incorrect construction of the Act; the order provides insufficient response time for SAA to have an adequate hearing and that the proposed final order should provide sufficient time for SAA to cease its U.S. operations in an orderly fashion; the effective date of the final order should be stayed pending final judicial determination of its legality.

Southern Air Transport also filed a comment to Order 86-10-60, requesting an exemption so that its L-100 Hercules aircraft can land and take off from the SAFAIR maintenance facility in South Africa solely for maintenance work.

As fully discussed below, we reject South African Airways' arguments and deny its request for a stay as well as the exemption request of Southern Air Transport. Therefore, subject to the disapproval of the President pursuant to section 801(a) of the Federal Aviation Act, we are finalizing the actions proposed in Order 86-10-60.

We are taking this action to implement Congress' determination that the United States should impose sanctions on the South African government to encourage that government to adopt reforms leading to the establishment of a non-racial democracy. Section 101 of the Act. Congress, moreover, wanted immediate implementation of its policy. Senator Kasten expressed the sense of the Congress that "[w]e must make it clear to the South African Government that this policy must be abolished, and that real movement toward an egalitarian society must be made, and made now." 132 Cong. Rec. S11876 (daily ed., August 15, 1986).

We reject SAA's argument that immediate revocation is not required by the Act or the Executive Order. Section 306(a)(2) of the Act states that:

> Ten days after the date of enactment of this Act, the President shall direct the Secretary of Transportation to revoke the right of any air carrier designated by the Government of South Africa under the Agreement to provide service pursuant to the Agreement.

The meaning of the words is clear. The South African carrier's rights to serve pursuant to the Agreement are to be revoked as quickly as possible. SAA's argument that this section does not call for action before termination of the Agreement are not convincing, since it calls for the revocation of rights to provide "service pursuant to the Agreement." Congress could not have intended that we wait until after the Agreement had been terminated because, by that time, there would be no existing agreement under which a South African carrier would be designated or have rights. Such an interpretation would render section 306(a)(2) a nullity. Thus, SAA's interpretation would render this statute meaningless, contrary to the canons of statutory construction. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); *see also American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). SAA's argument that immediate revocation is not required because section 306(a)(2) specifies no time constraint is equally unconvincing. The requirement that, in 10 days, "the President shall direct the Secretary . . .", clearly indicates that Congress desired haste. Had it expected DOT to wait the year that it takes to terminate the Agreement, there would have been no point in instructing the President to direct the Secretary in ten days.

The Executive Order similarly supports immediate revocation by stating:

> The Secretary of Transportation shall take the steps specified in Sections 306(a)(2) and (3).

This is a simple endorsement of the steps which Congress has decided should be taken: immediate revocation of operating rights.

SAA's argument that our interpretation of section 306(a)(2) is inconsistent with section 306(b)(2) (which does not take effect until after the Agreement is terminated) is also inconsistent with the legislative history of this statute; that legislative history makes it clear that Congress wanted section 306(a)(2) to be implemented immediately.

Section 306, as it was reported out of the Senate Foreign Relations Committee on August 6, 1986, provides that aviation sanctions would occur after the Agreement had been terminated in accordance with the terms of the Agreement. What this meant was that the sanction would not be in place for a year because Article IX of the Agreement provides for one year's notice before termination.

On August 14, 1986, the Senate considered Amendment No. 2741, which was introduced by Senators Sarbanes and Kassebaum, both members of the Senate Foreign Relations Committee. This amendment proposed to add to the bill what is now paragraph (a) of section 306 which includes the immediate revocation provisions. In offering the amendment, Senator Sarbanes said he was doing so to correct a drafting error in the legislation. He stated:

> When the committee considered immediate sanctions and future sanctions to express our opposition to apartheid, the termination of air transportation was included among those that would be imposed immediately. . .
>
> I think most members assumed that in acting with respect to air travel, the committee was acting in a manner to ensure that the ban would take effect, if not immediately, at least in the very near future and not a year down the road. In fact, the bill itself contains in a different section a list of other sanctions

> which would be put into place a year from now if there were not significant progress toward dismantling apartheid.

Congressional Record, S 11712 (daily ed. August 14, 1986).

Senator Pell, also a member of the Foreign Relations Committee, then noted his own understanding of what the Committee had intended:

> I think it [the Amendment] fills a gap in the bill as reported by the committee. My own recollection is that the committee's intention was to impose this sanction immediately. Adoption of this measure will ensure that.

Congressional Record, S 11713 (daily ed. August 14, 1986).

When the Senate approved the amendment after floor debate, it was clear that it knew it had voted for immediate sanctions. Although the Senate did not completely reconcile the Amendment's provisions and the Foreign Relations Committee's provisions, the Senate's intent was clear.

Given the clarity of the Congressional intent and the specificity of the legislation, there is not need to reconcile it with section 1102(a) of the Federal Aviation Act, which requires the Secretary to act consistently with any agreement in force between the United States and another country. To the extent that there exists an inconsistency between this section and the Comprehensive Anti-Apartheid Act, the more specific statutory provisions of the latter prevail over the more general one. *See Morton v. Mancari*, 417 U.S. 535 (1974).[1]

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[1] SAA also argues that section 306(a)(2) does not apply to the permit issued to South African Airways because that provision revokes the right of a South African-designated "air carrier". As section 306(d) provides that the term "air carrier" has the same meaning as it does in the Federal Aviation Act, *i.e.*, a citizen of the United States, SAA states that section 306(a)(2) does not apply to SAA because it is a legal

SAA also argues that revocation would constitute a breach of the Agreement because it is not justified by any violation of the Agreement or of any of the conditions in SAA's permit. This argument ignores the extraordinary context within which this order is being issued. The Congress has enacted a broad spectrum of sanctions, including aviation sanctions, to be taken against the Government of South Africa. The President is carrying out these sanctions, including the revocation of the rights of South African-designated air carriers to operate to the U.S. Under such circumstances, the President has sufficient authority to take actions which may be contrary to Executive Agreements. Similarly, it is established that Congress may act in a manner that is inconsistent with Executive Agreements. *See Whitney v. Robertson,* 124 U.S. 190 (1888), and *Goldwater v. Carter,* 617 F.2d 697 (D.C. Cir. 1979).

SAA also argues that it has been afforded insufficient time in which to respond to the show cause order, asserting that two day's notice denies it its due process right to a fair hearing. It now requests an additional 10 days in which to respond. Previously, SAA had filed a motion requesting that the date for responses be extended until November 7, 1986. As we stated in denying that motion in Order 86-10-62, SAA has had almost a month to prepare its response. With enactment of the Act on October 2, 1986, SAA knew precisely the actions which the Depart-

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citizen of the Republic of South Africa. We reject this argument as an attempt to use a technical distinction to obliterate the plain meaning of section 306(a)(2). Section 306(a)(2) revokes the right of air carriers designated by the Government of South Africa under the Agreement. Its language tracks the use of the term "air carrier" as used in Section I of the Agreement Annex, where the U.S. grants to South Africa "the right to conduct air transport services by one or more air carriers of South African nationality designated by the latter country." Clearly, SAA is that designated "air carrier." In fact, Section 306(a)(2) can only have meaning if it is directed to SAA. SAA acknowledges as much at page 15 of its Response when it states that "South African Airways remains the only designated carrier of the Republic of South Africa."

ment would be taking. Furthermore, at a meeting held at the State Department at the request of the South African Government on October 8, 1986, the U.S. Government explained to SAA officials that the Department of Transportation would shortly be issuing a show cause order with comments due in two working days. In view of this lead time, which is in fact more than for many DOT show cause orders, SAA has had adequate time to prepare its response. In analogous situations, we have granted foreign air carriers far less response time. *See,* Order 81-12-171, December 29, 1981, suspending LOT's air carrier permit in 1981 after two days' notice to respond. SAA has filed a full response and has not been prejudiced by the response period in the show cause order. We also see no reason to provide SAA an opportunity for oral argument, since it has had an adequate opportunity to present its case.

SAA also argues that the revocation of its permit, three days after the effective date of the final order, does not provide it with sufficient time to terminate its U.S. operations in an orderly manner. We disagree. As noted above, SAA has had notice since October 2, 1986, of the Congressional action requiring sanctions. In fact it appears that SAA has already begun the process of terminating its operations. Shortly after enactment of the Act, it reduced its service from four to two roundtrips per week. In addition, routine inquiries made by the Department reveal that SAA has been informing the public that it does not know beyond the immediate week whether it will be conducting operations the following week. We do not believe that it would either be in the public interest or consistent with Congressional intent to grant SAA the additional 90 days it has requested to close down its U.S. operations.

Finally, SAA requests that the effective date of the final order be stayed pending final judicial review. SAA has failed to provide any basis for receiving a stay under the established standards for obtaining a stay of agency action.

In any event, Congress' determination that the public interest requires the prompt implementation of the sanctions legislation in itself requires the denial of SAA's stay request.

With regard to the request of Southern Air Transport for an exemption to allow it to land and takeoff in South Africa solely for maintenance work, we will not grant it the blanket exemption it requests. Section 306(c) provides that exceptions can be made by the Secretary to handle "emergencies in which the safety of an aircraft or its crew or passengers is threatened." Carriers may, consistent with section 306(c), apply on a case by case basis for an exemption from the condition imposed by this order.

ACCORDINGLY,

1. We find that it is in the public interest and required by the public convenience and necessity to revoke the permit issued to South African Airways by Order 73-10-2, and to condition the operating authority of all U.S. air carriers to prohibit service between the United States and South Africa and to prohibit the takeoff and landing of their aircraft in South Africa;

2. We make final the tentative findings and conclusions in Order 86-10-60;

3. We deny all requests for relief filed by South African Airways and Southern Air Transport in Docket 44454;

4. On the third day following the effective date of this order, we revoke the foreign air carrier permit issued to South African Airways by Order 73-10-2;

5. We amend the certificates of public convenience and necessity and exemption authority of all U.S. air carriers to add the following condition:

> Notwithstanding the provisions of this [certificate/exemption] or any other Department regulation, effective immediately, the holder shall not provide service

between the United States and South Africa, nor shall any of its aircraft take off or land in South Africa.

6. Unless disapproved by the President of the United States under section 801(a) of the Federal Aviation Act, this order shall become effective on the 61st day after its submission to the President, or upon receipt of advice from the President that he does not intend to disapprove the Department's order under section 801(a), which ever occurs earlier; [2]

7. We will serve a copy of this order on all certificated air carriers, South African Airways, the Ambassador of South Africa and the U.S. Department of State.

By:

/s/ ELIZABETH HANFORD DOLE
ELIZABETH HANFORD DOLE
Secretary of Transportation

(SEAL)

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[2] This order was transmitted to the President on November 3, 1986. On November 13, 1986, we received notification that the President did not intend to disapprove the Department's order. The third day referred to in ordering paragraph 4 is November 16, 1986.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 86-1620

September Term, 1986

SOUTH AFRICAN AIRWAYS,

Petitioner

v.

ELIZABETH H. DOLE, SECRETARY,
U.S. DEPARTMENT OF TRANSPORTATION,

Respondent

FILED APR 24 1987

PETITION FOR REVIEW OF AN ORDER OF THE U.S. DEPARTMENT OF TRANSPORTATION

Before: EDWARDS, SILBERMAN, and BUCKLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition for review of an order of the U.S. Department of Transportation, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the petition for review herein is hereby denied, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
George A. Fisher
Clerk

Date: April 24, 1987
Opinion for the Court filed by Circuit Judge Buckley

SECTION 306 OF THE COMPREHENSIVE ANTI-APARTHEID ACT OF 1986

PROHIBITION ON AIR TRANSPORTATION WITH SOUTH AFRICA

Sec. 306. (a)(1) The President shall immediately notify the Government of South Africa of his intention to suspend the rights of any air carrier designated by the Government of South Africa under the Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories, signed May 23, 1947, to service the routes provided in the Agreement.

(2) Ten days after the date of enactment of this Act, the President shall direct the Secretary of Transportation to revoke the right of any air carrier designated by the Government of South Africa under the Agreement to provide service pursuant to the Agreement.

(3) Ten days after the date of enactment of this Act, the President shall direct the Secretary of Transportation not to permit or otherwise designate any United States air carrier to provide service between the United States and South Africa pursuant to the Agreement.

(b)(1) The Secretary of State shall terminate the Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories, signed May 23, 1947, in accordance with the provisions of that agreement.

(2) Upon termination of such agreement, the Secretary of Transportation shall prohibit any aircraft of a foreign air carrier owned, directly or indirectly, by the Government of South Africa or by South African nationals from engaging in air transportation with respect to the United States.

(3) The Secretary of Transportation shall prohibit the takeoff and landing in South Africa of any aircraft by an air carrier owned, directly or indirectly, or controlled by a national of the United States or by any corporation or other entity organized under the laws of the United States or of any State.

(c) The Secretary of Transportation may provide for such exceptions from the prohibition contained in subsection (a) or (b) as the Secretary considers necessary to provide for emergencies in which the safety of an aircraft or its crew or passengers is threatened.

(d) For purposes of this section, the terms "aircraft", "air transportation", and "foreign air carrier" have the meanings given those terms in section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301).

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release October 27, 1986

EXECUTIVE ORDER

* * * * * * * *

IMPLEMENTATION OF THE COMPREHENSIVE ANTI-APARTHEID ACT

By the authority vested in me as President of the Constitution and statutes of the United States of America, including the Comprehensive Anti-Apartheid Act of 1986 (Public Law 99-440) ("the Act"), and section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

Section 1. Implementation of the Act. All affected Executive departments and agencies shall take all steps necessary, consistent with the Constitution, to implement the requirements of the Act.

Sec. 2. Functions of the Department of State. The Secretary of State shall be responsible for implementing Sections 208, 302 (to the extent it relates to temporary imports), 303(b), 307(a)(2), 317, 318, 401(b)(2), 501(b), 504, 506, and 508 of the Act. Responsibility for transmitting the report required by Section 509 of the Act is delegated to the Secretary of State.

Sec. 3. Functions of the Department of the Treasury. The Secretary of the Treasury shall be responsible for implementing Sections 301, 302 (to the extent it relates to permanent imports), 303, 305, 308, 309, 310, 319, 320, 323(a)(1), and 510 of the Act.

Sec. 4. Functions of the Department of Commerce. The Secretary of Commerce shall be responsible for implementing Sections 304, 321, and 502(b) of the Act.

Sec. 5. Functions of the Department of Defense. The Secretary of Defense shall be responsible for implementing Section 322 of the Act.

Sec. 6. Functions of the United States Trade Representative. The United States Trade Representative shall be responsible for implementing Sections 323(a)(2) and (b) of the Act and Section 402 (except for the imposition of import restrictions).

Sec. 7. Functions of the Agency for International Development. The Administrator of the Agency for International Development shall be responsible for implementing Sections 210 (to the extent of determining the existence of food shortages only) and 505 of the Act.

Sec. 8. Functions of the Department of Transportation. The Secretary of Transportation shall take the steps specified in Sections 306(a)(2) and (3).

Sec. 9. Definition of Strategic Minerals. The Secretary of State shall be responsible, in consultation with the Secretary of Commerce and the Secretary of Defense, for determining which articles are strategic minerals within the meaning of the Act.

Sec. 10. Regulatory and Enforcement Authority. The head of each agency assigned functions by this Order is delegated authority under Sections 601 and 603 of the Act to the extent that they relate to functions delegated by this Order or conferred by the Act.

Sec. 11. Coordination and Policy Guidance. The Secretary of State is responsible for ensuring that implementation of the Act is effectively integrated with and is supportive of the foreign policy of the United States. In carrying out their respective functions and responsibilities, the head of each agency assigned responsibility under this Order shall consult with the heads of other affected agencies.

Sec. 12. Inter-Agency Coordinating Committee. An Inter-Agency Coordinating Committee on South Africa is hereby established, under the Chairmanship of the Secretary of State. The Committee shall also include the Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of Commerce, Secretary of Transportation, Secretary of Agriculture, the United States Trade Representative, and other members as appropriate. The Committee shall serve as a forum for consultations on United States policy concerning South Africa and shall monitor implementation of the Act to ensure consistency with United States policy objectives.

Sec. 13. Reservations of Functions. All authority not expressly delegated or granted herein is retained by the President. The President retains the authority to exercise any of the authority delegated or granted in this Order.

Sec. 14. Effective Date. This Order shall be effective immediately.

/s/ RONALD REAGAN

THE WHITE HOUSE,
October 27, 1986.

# # # # # # #

Agreement between the United States of American and the Union of South Africa respecting air transp. services. Signed at Cape Town, May 23, 1947; entered into force May 23, 1947. And agreement effected by exchange of notes signed at Cape Town May 23, 1947; entered into force May 23, 1947.

AGREEMENT
BETWEEN
THE GOVERNMENT OF THE UNITED STATES OF AMERICA
AND
THE GOVERNMENT OF THE UNION OF SOUTH AFRICA
RELATING TO
AIR SERVICES BETWEEN THEIR RESPECTIVE TERRITORIES.

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNION OF SOUTH AFRICA RELATING TO AIR SERVICES BETWEEN THEIR RESPECTIVE TERRITORIES.

The Government of the United States of America and the Government of the Union of South Africa, considering—

that the possibilities of commercial aviation as a means of transport have greatly increased, and

that it is desirable to organize the international air services in a safe and orderly manner and to further as much as possible the development of international co-operation in this field,

have appointed their representatives, who duly authorized have agreed upon the following:

ARTICLE I.

The contracting parties grant to each other the rights specified in the annex hereto for the establishment of the international air services set forth in that annex, (hereinafter referred to as the "agreed services").

ARTICLE II.

(A) The agreed services may be inaugurated immediately or at a later date at the option of the contracting party to whom the rights are granted, on condition that—

(1) the contracting party to whom the rights have been granted shall have designated an air carrier or carriers for the specified route or routes

(2) the contracting party which grants the rights shall have given the appropriate operating permission to the air carrier or carriers concerned pursuant

to paragraph (B) of this article which (subject to the provisions of Article VI) it shall do with the least possible delay.

(B) The designated air carrier or carriers may be required to satisfy the aeronautical authorities of the contracting party granting the rights that it or they is or are qualified to fulfil the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operations of commercial air carriers.

ARTICLE III.

(A) The charges which either contracting party may impose or permit to be imposed on the designated air carrier or carriers of the other contracting party for the use of airports and other facilities shall not be higher than would be paid for the use of such airports and facilities by its national aircraft employed in similar international air services.

(B) Fuel, lubricating oils and spare parts introduced into, or taken on board aircraft in the territory of one contracting party by, or on behalf of, any designated air carrier of the other contracting party and intended solely for use by the aircraft of such carrier shall be accorded, with respect to customs duties, inspection fees and other charges imposed by the former contracting party, treatment not less favourable than that granted to national air carriers engaged in international air services or such carriers of the most favoured nation.

(C) Aircraft of the designated airline of one contracting party operating on the agreed services on a flight to, from or across the territory of the other contracting party shall be admitted temporarily free from customs duties subject otherwise to the customs regulations of such other contracting party. Supplies of fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board

aircraft of any designated air carrier of one contracting party shall be exempt in the territory of the other contracting party from customs duties, inspection fees or similar duties or charges, even though such supplies be used by such aircraft on flights within that territory.

ARTICLE IV.

Certificates of airworthiness, certificates of competency and licences issued or rendered valid by one contracting party and still in force shall be recognized as valid by the other contracting party for the purpose of operation of the agreed services. Each contracting party reserves the right, however, to refuse to recognize for the purpose of flight above its own territory, certificates of competency and licences granted to its own nationals by another state.

ARTICLE V.

(A) The laws and regulations of one contracting party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of the other contracting party, and shall be complied with by such aircraft upon entering or departing from or while within the territory of the first party.

(F) The laws and regulations of each contracting party as to the admission to sojourn in and departure from its territory of passengers, crew and cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs and quarantine, shall be observed.

ARTICLE VI.

Each contracting party reserves the right to withhold or revoke a certificate or permit to an air carrier designated by the other contracting party in the event that it

is not satisfied that substantial ownership and effective control of such carrier are vested in nationals of the other contracting party, or in case of failure by that carrier to comply with the laws and regulations referred to in Article V hereof, or otherwise to fulfil the conditions under which the rights are granted in accordance with this agreement and its annex.

ARTICLE VII.

(A) In a spirit of close collaboration, the aeronautical authorities of the two contracting parties will consult regularly with a view to assuring the observance of the principles and the implementation of the provisions outlines in this the present agreement and its annex.

(B) In the event of the aeronautical authorities of either contracting party failing or ceasing to publish information in relation to the agreed services on lines similar to that included in the Airline Traffic Surveys (Station to Station and Origination and Destination) now published by the Civil Aeronautics Board and failing or ceasing to supply such data of this character as may be required by the International Civil Aviation Organization, the aeronautical authorities of such contracting party shall supply, on the request of the aeronautical authorities of the other contracting party, such information of that nature as may be requested.

ARTICLE VIII.

For the purpose of the present agreement and its annex—

(A) the term "territory" as applied to each contracting party shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection, mandate, or trusteeship of such contracting party;

(B) the term "aeronautical authorities" shall mean in the case of the Union of South Africa the Minister in Charge of Civil Aviation, and in the case of the United States the Civil Aeronautics Board, and in both cases any person or body authorized to perform the functions presently exercised by the aeronautical authorities as defined herein;

(C) the term "international air services" shall have the meaning specified in Article 96 of the Convention on International Civil Aviation signed at Chicago on December 7, 1944.

ARTICLE IX.

Except as otherwise provided in this agreement or its annex, any dispute between the contracting parties relative to the interpretation or application of this agreement or its annex, which cannot be settled through consultation, shall be submitted for an advisory report to a tribunal of three arbitrators, one to be named by each contracting party, and the third to be agreed upon by the two arbitrators so chosen provided that such third arbitrator shall not be a national of either contracting party. Each of the contracting parties shall designate an arbitrator within two months of the date of delivery by either party to the other party of a diplomatic note requesting arbitration of a dispute; and the third arbitrator shall be agreed upon within one month after such period of two months. If the third arbitrator is not agreed upon, within the time limitation indicated, the vacancy thereby created shall be filled by the appointment of a person, designated by the president of the council of ICAO, from a panel of arbitral personnel maintained in accordance with the practice of ICAO. The executive authorities of the contracting parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report. A moiety of the expenses of the arbitral tribunal shall be borne by each party.

ARTICLE X.

This agreement and all relative contracts shall be registered with the International Civil Aviation Organization.

ARTICLE XI.

(A) This agreement, including the provisions of the annex thereof, will come into force on the day it is signed.

(B) Either contracting party may at any time request consultation with the other with a view to initiating any amendments of this agreement or its annex which may be desirable in the light of experience. If a multilateral air convention enters into force in relation to both contracting parties, such consultation shall take place with a view to amending the present agreement or its annex so as to conform to the provisions of such a convention.

(C) Except as otherwise provided in this agreement or its annex, if either of the contracting parties considers it desirable to modify the terms of the annex to this agreement it may request consultation between the aeronautical authorities of both contracting parties, such consultation to begin within a period of sixty days from the date of the request. Any modification in the annex agreed to by said aeronautical authorities shall come into effect when it has been confirmed by an exchange of diplomatic notes.

(D) When the procedure for a consultation provided for in paragraph (B) of the present article has been initiated, either contracting party may at any time give notice to the other of its desire to terminate this agreement. Such notice shall be simultaneously communicated to the International Civil Aviation Organization.

This agreement shall terminate one year after the date of receipt of the notice to terminate by the other contracting party unless the notice is withdrawn by agreement before the expiration of this period. In the absence of

acknowledgment of receipt by the other contracting party, notice shall be deemed to have been received fourteen days after the receipt of the notice by the International Civil Aviation Organization.

Done at Cape Town this 23rd day of May, 1947, in duplicate in the English and Afrikaans languages, each of which shall be of equal authenticity.

T HOLCOMB

For the Government of the United States of America:

J C SMUTS

For the Government of the Union of South Africa:

ANNEX.

SECTION I.

The Government of the United States of America grants to the Government of the Union of South Africa the right to conduct air transport services by one or more air carriers of South African nationality designated by the latter country on the routes, specified in Schedule I attached, which transit or serve commercially the territory of the United States of America.

SECTION II.

The Government of the Union of South Africa grants to the Government of the United States of America the right to conduct air transport services by one or more carriers of United States nationality designated by the latter country on the routes, specified in Schedule II attached, which transit or serve commercially territory of the Union of South Africa.

SECTION III.

One or more air carriers designated by each of the contracting parties under the conditions provided in this agreement will enjoy, in the territory of the other contracting party, rights of transit of stops for non-traffic purposes and of commercial entry and departure for international traffic in passengers, cargo and mail at the points enumerated and on each of the routes specified in the schedules attached at all airports open to international traffic.

SECTION IV.

It is agreed between the contracting parties—

(A) that the two governments desire to foster and encourage the widest possible distribution of the benefits of air travel for the general good of mankind at the cheapest rates consistent with sound economic principles; and to stimulate international air travel as a means of promoting friendly understanding and good will among peoples and ensuring as well the many indirect benefits of this new form of transportation to the common welfare of both countries;

(B) that the designated airlines of the two contracting parties operating on the routes described in this annex shall enjoy fair and equal opportunity for the operation of the agreed services. If the designated airline of one contracting party is temporarily unable, as a result of the war to take advantage of such opportunity, the contracting parties shall review the situation with the object of assisting the said airline to take full advantage of the fair and equal opportunity to participate in the agreed services;

(C) that in the operation by the air carriers of either contracting party of international services described in the present annex, the interests of the air carriers of the other country shall, however, be taken into consideration so as

not to affect unduly the services which the latter provide on all or part of the same route;

(D) that the total air transport services offered by the carriers of both countries should bear a close relationship to the requirements of the public for such services;

(E) that the services provided by a designated air carrier under this agreement and its annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic;

(F) that the right of the air carriers of either country to embark and to disembark at points in the territory of the other country international traffic destined for or coming from third countries at a point or points on the routes specified in the schedules attached shall be applied in accordance with the general principles of orderly development to which both governments subscribe and shall be subject to the general principle that capacity shall be related—

(1) to traffic requirements between the country of origin and the countries of destination;

(2) to the requirements of through airline operation; and

(3) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

SECTION V.

(A) The determination of rates in accordance with the following paragraphs shall be made at reasonable levels, due regard being said to all relevant factors, such as cost of operation, reasonable profit, and the rates charged by

any other carriers, as well as the characteristics of each service.

(B) The rates to be charged by the air carriers of either contracting party between points in the territory of the United States and points in the territory of the Union of South Africa referred to in this annex shall, consistent with the provisions of the present agreement and its annex, be subject to the approval of the aeronautical authorities of the contracting parties, who shall act in accordance with their obligations under the present annex, within the limits of their legal powers.

(C) The Civil Aeronautics Board of the United States having approved the traffic conference machinery of the International Air Transport Association (hereinafter called "IATA"), for a period of one year beginning in February, 1947, any rate agreements concluded through this machinery during this period and involving United States air carriers will be subject to approval by the Board.

(D) Any rate proposed by the air carrier or carriers of either contracting party shall be filed with the aeronautical authorities of both contracting parties at least thirty days before the proposed date of introduction; provided that this period of thirty days may be reduced in particular cases if so agreed by the aeronautical authorities of both contracting parties.

(E) The contracting parties agree that the procedure described in paragraphs (F), (G) and (H) of this section shall apply—

(1) if, during the period of the Civil Aeronautics Board's approval of the IATA traffic conference machinery, either any specific rate agreement is not approved within a reasonable time by either contracting party or a conference of IATA is unable to agree on a rate; or

(2) if at any time no IATA machinery is applicable; or

(3) if either contracting party at any time withdraws or fails to renew its approval of that part of the IATA traffic conference machinery relevant to this section.

(F) In the event that power is conferred by law upon the aeronautical authorities of the United States to its fair and economic rates for the transport of persons and property by air on international services and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board at present is empowered to act with respect to such rates for the transport of persons and property by air within the United States, each of the contracting parties shall thereafter exercise its authority in such manner as to prevent any rate or rates proposed by one of its carriers for services from the territory of the other contracting party from becoming effective if in the judgment of the aeronautical authorities of the contracting party whose air carrier or carriers is or are proposing such rate, that rate is unfair or uneconomic. If one of the contracting parties on receipt of the notification referred to in paragraph (D) above is dissatisfied with the rate proposed by the air carrier or carriers of the other contracting party, it shall so notify the other contracting party prior to the expiry of the first fifteen of the thirty days referred to, and the contracting parties shall endeavour to reach agreement on the appropriate rate.

In the even that such agreement is reached, each contracting party will exercise its statutory powers to give effect to such agreement.

If agreement has not been reached at the end of the thirty day period referred to in paragraph (D) above, the proposed rate may, unless the aeronautical authorities of the country of the air carrier concerned see fit to suspend its application, go into effect provisionally pending the set-

tlement of any dispute in accordance with the procedure outlined in paragraph (H) below.

(G) Prior to the time when such power may be conferred by law upon the aeronautical authorities of the United States, if one of the contracting parties is dissatisfied with any rate proposed by the air carrier or carriers of either contracting party for services from the territory of one contracting party to a point or points in the territory of the other contracting party, it shall so notify the other prior to the expiry of the first fifteen of the thirty day period referred to in paragraph (D) above, and the contracting parties shall endeavour to reach agreement on the appropriate rate.

In the event that such agreement is reached each contracting party will use its best efforts to cause such agreed rate to be put into effect by its air carrier or carriers.

It is recognized that if no such agreement can be reached prior to the expiry of such thirty days, the contracting party raising the objection to the rate may take such steps as it may consider necessary to prevent the inauguration or continuation of the service in question at the rate complained of.

(H) When in any case under paragraphs (F) and (G) above the aeronautical authorities of the two contracting parties cannot agree within a reasonable time upon the appropriate rate after consultation initiated by the complaint of one contracting party concerning the proposed rate or an existing rate of the air carrier or carriers of the other contracting party, upon the request of either, both contracting parties shall submit the question to arbitration in the manner prescribed in Article IX of the Agreement.

(I) The Executive Branch of the Government of the United States agrees to use its best efforts to secure legislation empowering the aeronautical authorities of the

United States to fix fair and economic rates for the transport of persons and property by air on international services, and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board at present is empowered to act with respect to such rates for the transport of persons and property by air within the United States.

SECTION VI.

It is recognized that the determination of tariffs to be applied by an air carrier of one contracting party between the territory of the other contracting party and a third country is a complex question, the overall solution of which cannot be sought through consultation between only two countries. It is noted, furthermore, that the method of determining such tariffs is now being studied by ICAO. It is understood under these circumstances—

(A) that, pending the acceptance by both parties of any recommendations which ICAO may make after its study of this matter, such tariffs shall be subject to consideration under the provisions of Section IV (C) of the annex to the agreement.

(B) that in case ICAO fails to establish a means of determining such rates satisfactory to both contracting parties, the consultation provided for in Article XI (B) of the agreement shall be in order.

SECTION VII.

Changes made by either contracting party in the routes described in the schedules attached except those which change the points served by airlines of one contracting party in the territory of the other contracting party shall not be considered as modifications of the annex. The aeronautical authorities of either contracting party may therefore proceed unilaterally to make such changes, provided,

however, that notice of any change is given without delay to the aeronautical authorities of the other contracting party.

If such other aeronautical authorities find that, having regard to the principles set forth in Section IV of the present annex, interests of their air carrier or carriers are prejudiced by the carriage by the air carrier or carriers of the first contracting party of traffic between the territory of the second contracting party and the new point in the territory of a third country, the authorities of the two contracting parties shall consult with a view to arriving at a satisfactory agreement.

SECTION VIII.

After the present agreement comes into force, the aeronautical authorities of both contracting parties will exchange information as promptly as possible concerning the authorizations extended to their respective designated air carriers to render service to, through and from the territory of the other contracting party. This will include copies of current certificates and authorizations for service on the routes which are the subject of this agreement and, for the future, such new authorizations as may be issued together with amendments, exemption orders and authorized service patterns.

SCHEDULE I.

Airlines of the Union of South Africa authorized under the present agreement are accorded in the territory of the United States or a service or services between the Union of South Africa and New York rights of transit and non-traffic stop, as well as the right to pick up and discharge international traffic in passengers, cargo and mail at such points and over such routes as may be determined at a later date.

SCHEDULE II.

Airlines of the United States of America authorized under the present agreement are accorded rights of transit and non-traffic stop in the territory of the Union of South Africa, as well as the right to pick up and discharge international traffic in passengers, cargo and mail at Johannesburg and Cape Town on the following routes in both directions. On each of the routes described below the airline or airlines designated to operate such route may operate non-stop flights between any of the points on such route omitting stops at one or more of the other points on such route.

(1) United States via the North Atlantic and Africa to Johannesburg.

(2) United States via the Caribbean, South America, the South Atlantic and Africa to Cape Town.

The American Minister to the Minister of External Affairs to the Union of South Africa

LEGATION OF THE
UNITED STATES OF AMERICA
Cape Town

May 23, 1947

SIR:

I have the honor to refer to the Bi-lateral Air Transport Agreement concluded today between the Governments of the United States and the Union of South Africa at Cape Town and in regard to Article IX of this Agreement to state that it is the understanding of my Government that in the event either contracting party should find itself unable to carry out the terms of an advisory report which recommends rectifying action on the part of both contracting parties, the contracting party which finds itself unable to carry out the terms of such an advisory report shall so notify the other contracting party which, upon receipt of such notification, will not necessarily be bound to carry out the terms in such an advisory report.

This note and your confirmatory reply thereto will be regarded as constituting an agreement between the two Governments in the matter.

Please accept, Sir, the renewed assurance of my highest consideration.

T. HOLCOMB
Field Marshal

The Right Honorable J. C. Smuts, O.M., P.C., C.H., K.C., D.T.D., M.P.,
Minister of External Affairs,
Cape Town.

The Minister of External Affairs of the Union of South Africa to the American Minister

UNION OF SOUTH AFRICA.
UNIE VAN SUID-AFRIKA.

DEPARTMENT OF EXTERNAL AFFAIRS.
DEPARTMENT VAN BUITELANDSE SAKE.

Cape Town,
23 May 1947

MR. MINISTER,

I have the honour to acknowledge your note of today's date, which reads as follows:—

"Sir,

I have the honor to refer to the Bi-lateral Air Transport Agreement concluded today between the Governments of the United States and the Union of South Africa at Cape Town and in regard to Article IX of this Agreement to state that it is the understanding of my Government that in the event either contracting party should find itself unable to carry out the terms of an advisory report which recommends rectifying action on the part of both contracting parties, the contracting party which finds itself unable to carry out the terms of such an advisory report shall so notify the other contracting party which, upon receipt of such notification, will not necessarily be bound to carry out the terms of such an advisory report.

This note and your confirmatory reply thereto will be regarded as constituting an agreement between the two Governments in the matter.

Please accept, Sir, the renewed assurance of my highest consideration.

(Signed) T. HOLCOMB."

I confirm that your note and this reply will be regarded as constituting an agreement to this effect between the two Governments.

Please accept, Mr. Minister, the renewed assurance of my highest consideration.

J C SMUTS
Minister of External Affairs.

GENERAL THOMAS HOLCOMB,
Envoy Extraordinary and
Minister Plenipotentiary of
the United States of America,
Cape Town.

AIR TRANSPORT SERVICES

Agreement between the
UNITED STATES OF AMERICA
and the UNION OF SOUTH AFRICA

Amending Agreement of May 23, 1947

- Effected by Exchange of Notes
  Signed at Washington July 21 and
  November 2, 1953
- Entered into force November 2, 1953

The Secretary of State to the Ambassador of the Union of South Africa

DEPARTMENT OF STATE
WASHINGTON

July 21 1953

EXCELLENCY:

I have the honor to refer to your note of March 24, 1953[1] concerning a request of the Government of the Union of South Africa to amend paragraph (2) of Schedule II of the Annex to the Air Transport Agreement between the Government of the United States of America and the Union of South Africa signed on May 23, 1947.[2]

The Government of the Union of South Africa has requested that the Annex to the Agreement be amended by (a) the deletion in Schedule II of the words "and Capetown" after the word "Johannesburg" where the latter occurs for the first time, and (b) the substitution in paragraph (2) of Schedule II for the word "Capetown" of the word "Johannesburg".

The Government of the United States of America is agreeable to amending the Air Transport Agreement in accordance with the foregoing proposal. It is understood that the Government of the Union of South Africa is desirous of reserving the right to operate the air service to Capetown to air carriers of South African nationality.

I have the honor to suggest that the present note and your reply to that effect shall be regarded as placing on record the understanding arrived at between the two Governments in this matter and as amending the said Agreement accordingly.

---

[1] Not printed.

[2] Treaties and Other International Acts Series 1639; 61 Stat., pt. 3, p. 3066.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Secretary of State:
SAMUEL C WAUGH

His Excellency
G. P. JOOSTE,
Ambassador of the Union of South Africa.

The Ambassador of the Union of South Africa to the Secretary of State

EMBASSY OF THE UNION OF SOUTH AFRICA
AMBASSADE VAN DIE UNIE VAN SULD AFRIKA
WASHINGTON, D.C.

2nd November, 1953.

Sir,

I have the honour to acknowledge the receipt of your note of the 21st July, 1953 reading as follows:

> "I have the honour to refer to your note of March 24, 1953, concerning a request of the Government of the Union of South Africa to amend paragraph (2) of Schedule II of the Annex to the Air Transport Agreement between the Government of the United States of America and the Union of South Africa signed on May 23, 1947.
>
> "The Government of the Union of South Africa has requested that the Annex to the Agreement be amended by (a) the deletion in Schedule II of the words "and Capetown" after the word "Johannesburg" where the latter occurs for the first time, and (b) the substitution in paragraph (2) of Schedule II for the word "Capetown" of the word "Johannesburg".
>
> "The Government of the United States of America is agreeable to amending the Air Transport Agreement in accordance with the foregoing proposal. It is understood that the Government of the Union of South Africa is desirous of reserving the right to operate the air service to Cape Town to air carriers of South African nationality.
>
> "I have the honour to suggest that the present note and your reply to that effect shall be regarded as placing on record the understanding arrived at be-

tween the two Governments in this matter and as amending the said Agreement accordingly."

I have the honour to inform you that the Government of the Union of South Africa are in agreement with the foregoing and that your note and the present reply shall be regarded as placing on record the understanding arrived at between the two Governments in this matter and as amending the said Agreement accordingly.

Please accept, Sir, the renewed assurance of my highest consideration.

/s/ G.P. JOOSTE
Ambassador.

THE HONOURABLE JOHN FOSTER DULLES,
Secretary of State,
Department of State,
Washington, D.C.

SOUTH AFRICA

Air Transport Services

Agreement amending the agreement of May 23, 1947, as amended.
Effected by exchange of notes
Signed at Washington June 28, 1968;
Entered into force June 28, 1968.

The Secretary of State to the Ambassador of South Africa

DEPARTMENT OF STATE
WASHINGTON

June 28, 1968

EXCELLENCY:

I have the honor to refer to the consultations which took place in Washington in December 1967 in accordance with the United States—South Africa Air Transport Agreement signed on May 23, 1947, as amended,[1] and to propose, on behalf of my Government, that this agreement be further amended as follows:

1. Substitute for the words "Union" and "Unie", wherever they appear in the English and Afrikaans texts of the agreement, the words "Republic" and "Republick".

2. Delete Section VII of the Annex to the agreement.

3. Delete Schedule 1 and Schedule II of the Annex to the agreement and substitute therefore Schedule I and Schedule II as attached to this note, in both the English and Afrikaans languages.

If these proposals are acceptable to the Government of the Republic of South Africa, I have the honor to propose

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[1] TIAS 1639, 2870; 61 Stat. (3) 3057; 4 UST 2205.

that this note and your reply thereto constitute an agreement between our two Governments, further amending the Air Transport Agreement, which will enter into force on the date of your reply.

I should also appreciate receiving confirmation, as agreed during the consultations, that the Government of the Republic of South Africa will consider at a later stage the grant to the Government of the United States of America of traffic rights at Capetown and traffic rights to points beyond South Africa.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Secretary of State:
ANTHONY M. SOLOMON

His Excellency
H.L.T. TASWELL,
Ambassador of the
Republic of South Africa.

Enclosure: Schedules I and II of Annex.

SCHEDULE I

Airlines of the Republic of South Africa authorized under the present Agreement are accorded rights of transit and non-traffic stop in the territory of the United States of America, as well as the right to pick up and discharge international traffic in passengers, cargo and mail at New York on the following routes in both directions. On each of the routes described below, the airline or airlines designated to operate such route may serve the points on such route in any order on any flight and may operate non-stop flights between any of the points on such route, omitting stops at one or more of the other points on such route.

1. South Africa via points in Africa south of the equator, the Cape Verde Islands, the Canary Islands, Spain*, and Portugal* to New York.

2. South Africa via points in Africa south of the equator and South America to New York.

SCHEDULE II

Airlines of the United States of America authorized under the present Agreement are accorded rights of transit and non-traffic stop in the territory of the Republic of South Africa, as well as the right to pick up and discharge international traffic in passengers, cargo and mail at Johannesburg on the following routes in both directions. On each of the routes described below, the airline or airlines designated to operate such route may serve the points on such route in any order on any flight and may operate non-stop flights between any of the points on such route, omitting stops at one or more of the other points on such route.

1. United States via points in the Azores, the Canary Islands, the Cape Verde Islands, Portugal**, Spain**, Germany**, Italy**, Greece**, and Africa to Johannesburg.

2. United States via points in the Carribbean, South America, and Africa to Johannesburg.

BYLAE I.

Aan lugeksploitante van die Republik van Suid-Afrika wat ingevolge die onderhawige ooreenkoms angewys is,

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* Without traffic rights between points in these countries and New York.

** Without traffic rights between more than one point among these countries and Johannesburg on the same flight.

word die reg verleen om die gebied van die Verenigde State van Amerika oor te vlieg en vir nie-verkeersdoeleindes daarin te land, asook die reg om internasionale verkeer bestaande uit passasiers, vrag en posstukke by New York oor die volgende roetes in beide rigtings op en af te laai; oor elk van die ondervermelde rotes kan die lugeksploitant of eksploitante wat aangewys is om so'n roete te eksploiteer, die punte op sodanige roete in enige volgorde op enige vlug bedien en ononderbroke vlugte tussen enige plekke laugs daardie route onderneem en een of meer van die ander aandoenplekke langs daardie roete verbysteek:—

1. Suide-Afrika oor punte in Afrika suid van die ewenaar, die Kaap-Verdiese Eilande, die Kanariese Eilande, Spanje* en Portugal* na New York.

2. Suid-Afrika oor punte in Afrika suid van die ewenaar en Suid-Amerika na New York.

BYLAE II.

Aan lugeksploitante van die Verenigde State van Amerika wat ingevolge die onderhawige ooreenkoms aangewys is, word die reg verleen om die gebied van die Republiek van Suid-Afrika oor te vlieg en vir nie-verkeersdoeleindes daarin te land, asook die reg om internasionale verkeer bestaande uit passaiers, vrag en posstukke by Johannesburg oor die volgende rostes in beide rigtings op en af te laai; oor elk van die ondervermelde roetes kan die lubeksploitant of-eksploitante wat aangewys is om so'n route te eksploiteer, die punte op sodanige roete in enige volgorde op enige vlug bedien en ononderbroke vlugte tussen enige plekke langs daardie roete onderneem en een of meer van die ander aandoenpleek langs daardie roete verbysteek:—

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* Sonder verkeersregie tussen stilhouplekke in hierdie lande en New York.

1. Verenigde State oor punte in die Azores, die Kanariese Eilande, die Kaap-Verdiese Eilande, Portugal**, Spanje**, Duitsland**, Italie**, Griekeland** en Afrika na Johannesburg.

2. Verenigde State oor punte in die Karibiese Eilande, Suid-Amerika en Afrika na Jonannesburg.

The Ambassador of South Africa to the Secretary of State

EMBASSY OF SOUTH AFRICA
AMBASSADE VAN SUID-AFRIKA
WASHINGTON, D.C. 20008
June 28, 1968

EXCELLENCY,

I have the honour to acknowledge receipt of Your Excellency's note, with enclosure, of June 28, 1968, referring to the consultations which took place in Washington in December, 1967, in accordance with the United States-South Africa Air Transport Agreement signed on May 23, 1947, as amended, and proposing that this agreement be further amended.

I have the honour to inform Your Excellency that the Government of the Republic of South Africa accepts the proposals contained in Your Excellency's note which, with this reply, constitutes an agreement between our two Governments, further amending the Air Transport Agreement, which enters into force on this date.

I also have the honour to inform Your Excellency that the Government of the Republic of South Africa will consider at a later stage the grant to the Government of the United States of America of traffic rights at Capetown and traffic rights to points beyond South Africa.

** Sonder verkeersregie tussen meer as een punt tussen hierdie lande en Johannesburg op dieselfde vlug.

Accept, Excellency, the renewed assurances of my highest consideration.

/s/ H L TASWELL
H.L.T. Taswell,
Ambassabor.

His Excellency
DEAN RUSK,
Secretary of State,
Washington

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

- - - - - - - - - - -

PERMIT TO FOREIGN AIR CARRIER
(as amended)

- - - - - - - - - - -

SOUTH AFRICAN AIRWAYS

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, as follows:

1. Between a point or points in the Republic of South Africa, the intermediate point Rio de Janeiro, Brazil, and the terminal point New York, New York.

2. Between Johannesburg, South Africa, the intermediate points Sal Island and Las Palmas, and the terminal point New York, New York.

The holder hereof shall be authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of the Republic of South Africa for South African international air service.

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may be-

come effective during the period this permit remains in effect, to which the United States and the Republic of South Africa shall be parties.

By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

The holder shall keep on deposit with the Board a signed counterpart of C.A.B. Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

The holder (1) shall not provide foreign air transportation under this permit unless there is in effect third-party liability insurance in the amount of $1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the third-party liability insurance provided, and (2) shall not provide foreign air transportation with respect to persons unless there is in effect liability insurance sufficient to cover the obligations assumed in Agreement C.A.B. 18900, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the passenger liability insurance provided. Upon request, the Board may authorize the holder to supply the name and address of the insurance syndicate in lieu of the names and addresses of the member insurers.

The holder may not, without prior Board approval, perform charter transportation between New York, on the one hand, and Las Palmas, on the other hand: *Provided, however*, That this condition shall not prevent the holder from serving Las Palmas on charter flights operated between New York and Johannesburg. Applications for such authority shall conform to the procedures, to the extent applicable, for issuance of "Statements of Authorization" under Part 212 of the Board's Economic Regulations, or any amendments or modifications of such Regulation.

The exercise of the privileges granted hereby shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This permit shall be effective on September 28, 1973. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment thereto, which shall have the effect of eliminating the route hereby authorized from the routes which may be operated by airlines designated by the Government of the Republic of South Africa, or (2) upon the effective date of any permit granted by the Board to any other carrier designated by the Government of the Republic of South Africa in lieu of the holder thereof, or (3) upon the termination or expiration of the Air Transport Agreement between the Government of the United States and the Government of the Republic of South Africa, effective, May 23, 1947, as amended by exchange of notes, effective May 23, 1947, and June 28, 1968: *Provided, however*, That if prior to the occurrence of the event specified in clause (3) of this paragraph, the operation of the foreign air transportation herein authorized becomes the subject of any treaty, convention, or agreement to which the United States and the Republic of South Africa are or shall become parties, then and in that event this permit is con-

tinued in effect during the period provided in such treaty, convention, or agreement.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the 5th day of September, 1973.

/s/ EDWIN Z. HOLLAND

Secretary

(SEAL)

Issuance of this permit to
the holder approved by the
President of the United States
on September 28, 1973,
in Order 73-10-2.

Supreme Court, U.S.
FILED
SEP 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-142

In the Supreme Court of the United States

OCTOBER TERM, 1987

SOUTH AFRICAN AIRWAYS, PETITIONER

v.

ELIZABETH H. DOLE, SECRETARY,
DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

B. WAYNE VANCE
General Counsel
Department of Transportation
Washington, D.C. 20590

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-142

SOUTH AFRICAN AIRWAYS, PETITIONER

v.

ELIZABETH H. DOLE, SECRETARY,
DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, the air carrier designated by South Africa to provide service between that country and the United States, contends that Section 306 of the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1100-1101, did not compel the immediate revocation of its permit to provide service to this country but instead allowed it to continue providing service for a full year until termination of the bilateral agreement governing air services between the two countries.

1. a. The United States exchanges commercial aviation operating rights with other countries through bilateral agreements. Typically, a bilateral agree-

ment extends to each of the contracting countries the right to designate one or more air carriers to serve specified routes between the two countries. The bilateral agreement between the United States and South Africa (Pet. App. 33a-62a)[1] extends route rights to a carrier to be designated by the South African government. Article XI(D) of the agreement (61 Stat. 3061) provides that it will terminate one year after either party gives notice of its intent to end the agreement (see Pet. App. 39a-40a).

Carriers designated by foreign countries to provide service to the United States must obtain a permit or exemption authority from the Department of Transportation before they can begin service (49 U.S.C. (& Supp. III) App. 1372). Petitioner, the only carrier designated by South Africa, had been providing scheduled air service between the United States and South Africa under a permit (see Pet. App. 63a-66a) issued in 1973 by the Department's predecessor, the Civil Aeronautics Board.

b. The Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086, established a series of sanctions against the government of South Africa to encourage that government to end apartheid. Section 306 of the Act, 100 Stat. 1100-1101, is entitled "Prohibition on Air Transportation with South Africa." As reported from the Senate Foreign Relations Committee, Section 306 would have

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[1] Agreement Relating to Air Services Between Their Respective Territories, May 23, 1947, United States-South Africa, 61 Stat. 3057, T.I.A.S. No. 1639, 11 Bevans 501, 66 U.N.T.S. 233; amended 4 U.S.T. 2205, T.I.A.S. No. 2870, 206 U.N.T.S. 334; amended 19 U.S.T. 5193, T.I.A.S. No. 6512, 706 U.N.T.S. 287.

required only that the Secretary of State take steps to terminate the bilateral agreement between the United States and South Africa and that the Secretary of Transportation prohibit petitioner from operating to the United States *after* the agreement had terminated. S. 2701, 99th Cong., 2d Sess. § 306 (1986); see S. Rep. 99-370, 99th Cong., 2d Sess. 13-14 (1986). As noted above, termination of the agreement requires one year's advance notice.

What is now Section 306(a) of the Act was added to the bill on the Senate floor for the stated purpose of assuring the prompt revocation of petitioner's operating authority. In proposing the amendment, Senator Sarbanes noted that it was intended to assure that the "ban" on air service between the United States and South Africa "would take effect, if not immediately, at least in the very near future and not a year down the road." 132 Cong. Rec. S11712 (daily ed. Aug. 14, 1986).

Section 306(a) requires that the President "immediately notify the Government of South Africa of his intention to suspend the rights of any air carrier designated by the Government of South Africa under the [bilateral agreement]" (§ 306(a)(1), 100 Stat. 1100). It further provides that ten days after enactment the President is to "direct the Secretary of Transportation to revoke the right of any air carrier designated by the Government of South Africa to provide service pursuant to the Agreement" (§ 306(a)(2), 100 Stat. 1100).

On October 10, 1986, the Secretary of State gave the South African Ambassador one year's notice of the termination of the bilateral agreement by the United States (see Pet. App. 3a). The agreement will therefore terminate on October 10, 1987, and

petitioner's permit authority will then expire by its own terms (see *id.* at 65a).

On October 27, 1986, the President issued Executive Order No. 12,571, 3 C.F.R. 238 (Pet. App. 30a-32a), which (among other things) directed the Secretary of Transportation (the Secretary) to take the steps required by Section 306(a)(2) and (3) of the Anti-Apartheid Act. The Secretary revoked petitioner's permit on October 31, 1986 (Pet. App. 17a-25a). The Secretary's order explicitly considered and rejected petitioner's arguments that the Act did not contemplate revocation until the agreement had been terminated and that the bilateral agreement required her so to construe the Act (*id.* at 18a-22a).

After the President reviewed the Secretary's order pursuant to Section 801 of the Federal Aviation Act of 1958, 49 U.S.C. (& Supp. III) App. 1461, and advised the Secretary that he would not disapprove it, and after the court of appeals and the Chief Justice denied stays (see Pet. 9), the revocation became effective on November 16, 1986 (see Pet. App. 25a n.2). On April 24, 1987, the court of appeals denied a petition for review of the Secretary's order (*id.* at 1a-16a).

2. a. This case presents no question of general importance that merits review by this Court. The proper construction of Section 306(a)(2) of the Anti-Apartheid Act affects exactly one air carrier: petitioner. Moreover, any remaining effect of that section on petitioner is severely limited: even if petitioner's construction of Section 306 were to prevail, it would be permitted to fly only until October 10, 1987, at which point the Air Transport Services Agreement and petitioner's permit will expire by their own

terms (as petitioner recognizes).[2] The question presented—whether, under a statutory provision that affects no other carrier, petitioner's right to provide air services between the United States and South Africa expired on November 16, 1986, or will expire on October 10, 1987—plainly does not require resolution by this Court.

b. Furthermore, the decision of the court of appeals is correct. Petitioner does not (and cannot) seriously contend that the Secretary and the court of appeals have misconstrued the intent of Congress in its enactment of Section 306(a)(2). Rather, petitioner contends that decisions of this Court require an approach to statutory interpretation under which Congress's clear intent will not be carried out unless Congress chooses the right magic words. There is no merit to petitioner's contention.

(1) The court of appeals properly concluded that Section 306(a) of the Anti-Apartheid Act constitutes an "unambiguous statutory mandate" requiring prompt revocation of petitioner's permit (Pet. App. 12a n.2). The sole purpose of Section 306(a)(2) was to assure that petitioner's operating authority would be revoked *before* the end of the one-year notice period under the bilateral agreement. The original Senate committee bill, now Section 306(b), would have led to the result sought by petitioner: the carrier would

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[2] See Letter from Thomas J. Whalen to Hon. Joseph F. Spaniol, Jr. (Aug. 25, 1987). In that letter, petitioner contends that the expiration of the bilateral agreement "will not affect the justiciability of this matter." We do not know of any reason why the expiration of the agreement will not render this matter moot, but in any event the scope of the question presented, whether or not it is technically moot, is so narrow that certiorari is not warranted.

have been authorized to serve the United States throughout the one-year notice period required for termination of the bilateral agreement. That result was unacceptable to the Senate.

The language of the statute indicates that Congress intended immediate revocation of petitioner's operating authority. Section 306(a)(1) required that the President "*immediately* notify the Government of South Africa of his intention to suspend" such service (emphasis added). Section 306(a)(2) required the President to act within ten days to direct the Secretary to revoke petitioner's permit. As the court of appeals observed (Pet. App. 9a), this "evident urgency" is totally inconsistent with petitioner's suggestion that Section 306 can be read to allow it to continue to operate for a full year.[3]

The congressional debates leading to the adoption of Section 306 also fully support the Secretary's interpretation. When Senator Sarbanes introduced the

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[3] Petitioner asserts (Pet. 17) that, because the Act does not specify a time limit within which the Secretary must revoke its authority, the one-year termination period in the bilateral agreement should control. Petitioner, however, does not provide any rationale for requiring the President to issue his direction to the Secretary within ten days if the Secretary was then expected to wait a full year until the termination of the bilateral agreement. Petitioner concedes (*ibid.*) that termination of the agreement under Section 306(b) and revocation of operating rights under Section 306(a) are "distinct acts," yet its interpretation would make Section 306(a)(2) a nullity. There would be no need to direct the Secretary to take action to revoke petitioner's permit on termination of the bilateral agreement, since the permit terminates by its own terms "upon the termination or expiration of the Air Transport Agreement" (Pet. App. 65a). Thus, if Section 306(a)(2) is to have any effect at all, it must be construed to require prompt revocation of petitioner's permit authority.

amendment, he stated that its purpose was to cause the early termination of petitioner's service (132 Cong. Rec. S11712 (daily ed. Aug. 14, 1986)):

> When the committee considered immediate sanctions and future sanctions to express our opposition to apartheid, the termination of air transportation was included among those that would be imposed immediately.
>
> * * * * *
>
> I think most Members assumed that in acting with respect to air travel, the committee was acting in a manner to ensure that the ban would take effect, if not immediately, at least in the very near future and not a year down the road.

In supporting the amendment, Senator Pell similarly stated: "[T]he committee's intention was to impose this sanction immediately. Adoption of the amendment will ensure that." 132 Cong. Rec. S11713 (daily ed. Aug. 14, 1986). As Senator Sarbanes added, "This is a sanction that all have regarded as meaningful and significant. To delay it for a year is to undercut what this body is seeking to accomplish." *Id.* at S11714.[4]

(2) Despite this clear congressional intent, petitioner contends that, because the revocation of its

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[4] The House of Representatives shared the Senate's understanding of the intent and effect of Section 306(a). During the debates leading to the override of the President's veto of the bill, the Members of the House who spoke on this subject noted that the bill would bring about a prompt cessation of air service. See, *e.g.*, 132 Cong. Rec. H8653 (daily ed. Sept. 29, 1986) (remarks of Cong. Dannemeyer); *id.* at H8661 (remarks of Cong. Tallon); *id.* at H8667 (remarks of Cong. Biaggi); *id.* at H8668 (remarks of Cong. Hubbard).

permit allegedly constituted a violation of the bilateral agreement, the court of appeals was required to reach a different result. That argument is incorrect.

We assume arguendo, as did the court of appeals, that the revocation of petitioner's permit constituted a violation of the obligations of the United States under the bilateral agreement.[5] Such a violation, however, would not undercut the clear meaning of Section 306(a). Congress may adopt legislation contrary to this country's obligations under a treaty or executive agreement. See, *e.g.*, *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888); *Diggs* v. *Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973). And, given Congress's clear intent to bring about prompt revocation, it is not relevant whether Congress intended to violate the bilateral agreement. "[I]t is wholly immaterial to inquire * * * whether such departure [from the agreement] was by accident or design * * *." *Whitney* v. *Robertson*, 124 U.S. at 195.

Nor does the involvement of an international agreement require courts to forsake accepted principles of

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[5] The United States Government has not yet taken a position on whether a violation has occurred. Some Members of Congress took the position (see 132 Cong. Rec. S11712 (daily ed. Aug. 14, 1986) (remarks of Sen. Sarbanes)) that it was proper to revoke petitioner's permit immediately notwithstanding Article XI(D) because the Republic of South Africa was in breach of the provision of the agreement that requires it "to foster and encourage the widest possible distribution of the benefits of air travel for the general good of mankind" (Pet. App. 41a). Others took the contrary view that immediate termination would put the United States in breach of the agreement (see 132 Cong. Rec. S11713-S11714 (daily ed. Aug. 14, 1986) (remarks of Sen. Lugar)).

statutory construction. Petitioner contends that a court may look only at the language of the statute in question to determine whether it nullifies or supersedes a provision of an international agreement. Pet. 15 (citing *Weinberger* v. *Rossi*, 456 U.S. 25 (1982)). *Rossi*, however, demonstrates precisely the opposite. Far from slavishly adhering to the statutory language, this Court corrected the wording of the statute to reflect obvious congressional intent.[6] Moreover, rather than limit its consideration to the language of the statute, the Court in *Rossi* conducted a searching review of the legislative history of the provision in question to aid its determination of congressional intent (456 U.S. at 32-36). Similarly, in *Chew Heong* v. *United States*, 112 U.S. 536 (1884), which petitioner cites (Pet. 13, 15, 19), the Court declined to limit its consideration to the text of the statute in question, but conducted an extensive inquiry in an effort to ascertain congressional intent, including an application of "recognized rules of interpretation" (112 U.S. at 554).

United States v. *Lee Yen Tai*, 185 U.S. 213 (1902), on which petitioner relies (Pet. 14), is not to the contrary. That case stands for the unremarkable proposition that, when a statute and a treaty "are not absolutely irreconcilable," the courts should, "if possible," give effect to both (185 U.S. at 222). As noted above, however, the Secretary and the court of appeals properly found that petitioner's construction of Section 306 is simply not "possible" in light of Congress's clearly expressed intent.

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[6] The section in question in *Rossi* began with the phrase "'[u]nless prohibited by'" treaty. The Court, however, assumed that Congress meant to say, "'[u]nless provided by treaty.'" 456 U.S. at 29.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 87-142

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTH AFRICAN AIRWAYS,
Petitioner,

v.

ELIZABETH H. DOLE, SECRETARY
U.S. DEPARTMENT OF TRANSPORTATION,
Respondent.

Reply Brief of Petitioner In Support of Petition for a Writ of Certiorari

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DEPARTMENT OF TRANSPORTATION

Respondent

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Petition for a Writ of Certiorari presents to the Court the important question whether the Government correctly applied statutory language to abrogate an international agreement of the United States, when another reasonable construction of the statutory language would avoid such abrogation.

The Government, in its Memorandum in Opposition, ignores the issue as being of no moment. Petitioner urges that abrogation of an international agreement of the United States by government action, in whatever context it arises, is of considerable moment.

1. The critical issue is not, as the Government contends, whether the foreign air carrier permit of petitioner should terminate in November of 1986 or

in October of 1987. The issue in this case is the extent to which Congress must express in clear statutory language that the United States is acting to abrogate an international agreement of the United States.

As the Government has noted, "[t]he United States exchanges commercial aviation operating rights with other countries through bilateral agreements." (Resp. 1). The United States maintains many such agreements with countries worldwide, and the vast majority of such agreements contain termination clauses comparable to the provisions in Article VI and Article XI of the Agreement with the Government of South Africa.[1] This case raises the question: When the United States has agreed to Article VI and Article XI(D), what kind of congressional action is required to terminate the operating rights of a flag carrier contrary to the terms of the Agreement?

The attempt of the Government to depict this dispute as one which solely involves petitioner and the termination date of petitioner's operating rights ignores the issue presented.[2] The statutory language in

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[1] Article VI specifies the circumstances under which a foreign air carrier permit of a carrier of one party may lawfully be revoked by the government of the other party, and Article XI contains the procedure for the termination of the Air Transport Agreement itself.

[2] The Government does not argue that expiration of the Air Transport Agreement would render the issue presented moot, but instead argues that "the scope of the question presented, whether or not it is technically moot, is so narrow that certiorari is not warranted." (Resp. 5 n.2)

Expiration of the Air Transport Agreement would not render moot the important public issue presented herein which is "capable of repetition," but would "evad[e] review" due to the

§306(a) of the Anti-Apartheid Act directing the revocation of the foreign air carrier permit of petitioner can be applied in a manner which either terminates the permit immediately, as was done, or terminates the permit in the future, i.e., at a point coincident with the one-year termination date of the Air Transport Agreement. Neither the Court of Appeals for the District of Columbia Circuit, nor the Government in its Memorandum in Opposition, have disputed that 306(a)(2) may be applied in either manner.[3]

Furthermore, neither the Court of Appeals nor the Government have disputed (1) that the construction of §306(a)(2) which was adopted, requiring immediate termination of service by petitioner, violates the Air Transport Agreement or (2) that a construction of §306(a)(2) which would terminate the operating rights of petitioner simultaneously with the termination of the Air Transport Agreement would not violate the Agreement. In this case, the question facing the Sec-

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short, one year period until the termination of a bilateral aviation agreement becomes effective. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911); *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.3 (1983); *Mandel v. Bradley*, 432 U.S. 173, 175 n.1 (1977); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Brown v. Chote*, 411 U.S. 452, 457 n.4 (1973).

[3] The argument of the Government (Resp. 6 n.3) that the position of petitioner would render §306(a)(2) a nullity is not valid. Sections 402 and 416, respectively, of the Federal Aviation Act, 49 U.S.C. §1372, §1386 (1982), permit the U.S. Government to grant permits and exemptions from the permit requirement to foreign air carriers, even though a bilateral air transport agreement may not be effective and controlling. Section 306(a)(2), however, would preclude the continuation or issuance of any operating authority to South African Airways, even after the termination of the Air Transport Agreement.

retary of Transportation was which construction should be placed on the statute. Given the fact that these two alternate constructions of §306(a)(2) are possible based upon the statutory language alone, the required construction under the decisions of the Court is one which would avoid the contravention of an international agreement of the United States. That is, if it is possible to interpret a statute in order to avoid violation of a treaty, that interpretation should be followed, notwithstanding some evidence of legislative support for a contrary interpretation.

The Government argues in response that the position of petitioner is that Congress's intent cannot be carried out unless Congress chooses "the right magic words" (Resp. 5). If that is how the Government characterizes the decisions of the Court which require that congressional action inconsistent with treaties and international agreements of the United States must be so clear that no other such construction of the language employed is possible to avoid violation of the Agreement, petitioner adopts that position unreservedly. Petitioner relies fully upon the long-established precedent of the decisions of the Court that while Congress may take action inconsistent with an international treaty of the United States it must do so explicitly. *Chew Heong v. United States*, 112 U.S. 536, 549-50 (1884).

The question of congressional intent is not so settled as it is portrayed by the Government. Although the Senate did adopt the amendment which subsequently included §306(a)(2) of the Anti-Apartheid Act as a result of the stated desire of certain senators for an immediate termination of the foreign air carrier permit of petitioner, it is *not* clear that Congress

wanted immediate revocation or termination if such action *did* violate the Air Transport Agreement. (Pet. 7-8). Since the Government does not dispute the fact that a revocation prior to expiration of the Air Transport Agreement does violate the international agreement in this case, it is therefore all the more important that Congress must *spell out* its desire to revoke in breach of the international agreement.

Petitioner does not dispute that Congress *can* take action which revokes or is inconsistent with a treaty or international agreement of the United States. As petitioner has repeatedly argued, however, in order to do so Congress must state the action which is required in language which would not permit the provisions of the affected treaty to remain effective.

The Government's statement also seems to imply that petitioner argues that legislative intent is never a factor in statutory interpretation. That, of course, is not petitioner's argument. Legislative intent is always relevant in constructing a statute. If an international agreement were not affected by such a construction, evidence of congressional intent in the legislative history is perhaps the *best* aid in determining a proper construction to be placed upon an ambiguous statute.

Where, however, a construction, whether derived from legislative history or from the application of other traditional rules of statutory construction, would abrogate a treaty provision or stipulation in an international agreement it must then be determined, under the decisions of the Court, whether another construction of the statutory language is possible to avoid the abrogation of the treaty or international agreement.

The Government correctly states that "petitioner contends that a court may look only at the language of the statute in question to determine whether it nullifies or supersedes a provision of an international agreement." (Resp. 9). The decisions of the Court so hold, and the Government has cited none to the contrary.

In *Weinberger v. Rossi*, 456 U.S. 25 (1982), the Court examined the legislative history to support a construction which *gave effect to* an executive agreement. The policy underlying the *Weinberger* decision is one applicable to the present case, that is, if reasonably possible, a construction which gives effect to a treaty or international agreement is to be employed.

In *Chew Heong v. United States*, 112 U.S. 536 (1884), the parties offered interpretations of the statute which were both arguably valid options, but one interpretation of the statute would result in violation of the treaty in question. In applying the " 'recognized rules of interpretation' (112 U.S. at 554)," cited by the Government (Resp. 9), the Court adopted the interpretation which avoided interpreting the statute to violate the treaty. This is precisely the approach which the Secretary of Transportation should have adopted in implementing §306(a)(2) of the Anti-Apartheid Act.

The Government does not attempt to distinguish *United States v. Lee Yen Tai*, 185 U.S. 213 (1902), which, according to the Government,

> stands for the unremarkable preposition that, when a statute and a treaty "are not absolutely irreconcilable," the Courts should, "if possible" give effect to both (185 U.S. at 222).

(Resp. 9). While the proposition of *Lee Yen Tai* may be "unremarkable," it embodies a significant principle governing the proper interpretation of treaties and statutes, a principle which the Government fails to apply to the case at bar. Because it cannot quarrel with this proposition, the Government is left with no alternative but to assert "that petitioner's construction of Section 306 is simply not 'possible' in light of Congress's clearly expressed intent." (Resp. 9). This kind of statement ignores the language of §306(a)(b) itself which the Court of Appeals conceded could literally be interpreted to support petitioner's position, (Pet. App. 9a), a position which would have avoided abrogation of an international agreement.

CONCLUSION

For the reasons in its petition and in this reply brief, the Court should grant the petition for a writ of certiorari.

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